

**THE LAWS AND CUSTOMS
OF
THE TAMILS OF JAFFNA**

Revised Edition

DR. H. W. TAMBIAH

**PUBLISHED BY
WOMEN'S EDUCATION & RESEARCH CENTRE**

**THE LAWS AND CUSTOMS
OF
THE TAMILS OF JAFFNA**

Revised Edition

By

Dr. H. W. Tambiah
(With the original Foreword)
(By Sir F.J. Soertsz, K.C.)

With an introduction by

Shivaji Felix

Published by Women's Education & Research Centre

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FOREWORD I

There is the oft-quoted observation of Coke *non in legendo sed in intelligendo leges consistunt*. That observation was repeated many years later by Lord Mansfield, Lord Chief Justice of England, when he said "Very happily the more the law is looked at, the more it appears founded in equity, reason, and good sense." Mr. Tambiah in this excellent treatise which reveals a thorough and enthusiastic research of all the literature available on that body of laws known as The Thesawalamai has verified to us the dicta of Coke and Mansfield and has succeeded in presenting to us that system of laws as based in equity, reason and good sense and dispelling the impression that the uninitiated may have gathered that The Thesawalamai is a bewildering group of single instances, a dark continent in our sphere of laws has been brought to light and lawyers and judges will now be able to argue and decide cases with a greater feeling of assurance than they were able to entertain in the past.

Although The Thesawalamai consist of a body of laws that affects a very large number of the inhabitants of the Northern Province cases that arose exclusively under that system of laws were few and far between and lawyers with the heavy demands that a busy general practice makes on their time could hardly have been expected to do more than rely on the Ordinance itself and on the few scattered decisions of the Courts found in the Law Reports. Nor were these decisions consistent on many points, for judges could hardly do more than base themselves on such assistance as they received from the Bar. Mr. Tambiah's book will undoubtedly, put an end to this unhappy state of things and lawyers and judges will be able in future to rely on the wealth of material contained in it in order to know where to look for guidance to further research on any particular point that may arise and may require further research. I have read this book in manuscript and I desire to say that it speaks eloquently of so deep a study, so vast a reading and so careful a consideration of all the authorities and of all that persons conversant with the subject have written on it that Mr. Tambiah may rightfully expect an encouraging response

to his work on the part of the profession. This Island is far from being an authors paradise and such of them as regardless of financial consideration have published books and treatises have 'received back only a fraction of their cost. And yet we deplore the dearth of writers on legal topics. If we are really concerned to see that able young lawyers assist us with treatises on the many important questions of our law which stand in need of good handling we ought to make up our minds to be neither lenders nor borrowers of books.

Mr. Tambiah's has rendered a substantial service to the profession and it is for the profession to show their appreciation. It is subjects like that dealt with by Mr. Tambiah and by Mr. F.A. Hayley, K.C. that stand in need of elucidation and also such subjects as our peculiar law of registration of title and partition as were taken up by the late Mr. A. St.. Jayawardene, K.C., and Puisne Justice, that call for attention.

I wish Mr. Tambiah all the success he so richly deserves.

Sir F.J. Soertsz, K.C.,
Professor of Law, University of Ceylon,
Retired Senior Puisne Justice.

FOREWORD II

The book on Thesawalamai by H. W. Tambiah is being brought out by Women's Education and Research Centre (WERC) as a second edition under the same title – The Laws and Customs of the Tamils of Jaffna.

The second edition was brought out by us in the year 2000. All the copies were sold out. Since there is still a demand we decided to do a reprint(second edition by WERC). In this edition we are happy to include the foreword written by Dr. Tambiah in his original publication along with the foreword written by Sir F. J. Soertsz. K. C.

WERC, which usually publishes works on Gender Studies, became interested in Thesawalamai because it contains provisions for the protection of women's rights. Though anthropologists S. J. Tambiah and Jack Goody have pointed out Thesawalamai's pro-woman ideology (*Bride Wealth and Dowry*), it has not contributed to any dialogue or discussion in Sri Lanka among the feminist lawyers or activists. A woman's right to divorce her husband, inherit immovable property and to have separate property and claim her property after separation and divorce, are some of the progressive features found in the Thesawalamai. Yet, the law also has limitations on these rights. Women are prevented from disposing of the immovable property without the consent of their husbands. My feminist interest led me to conclude that while giving the women certain rights on the one hand Thesawalamai also has on the other hand, imposed some patriarchal limitation on her powers to dispose of her property. Seeking clarification of this issue, I met Dr. Tambiah not knowing that he had a manuscript in loose papers for a revised edition.

He was nearly 90 years old and physically fragile but his mind was still active and alert. He was pleased to meet me and when I introduced myself as being from WERC, he was even more pleased. Having failed in his many attempts to get this book re-published my mission gave him a flicker of hope. He asked me whether I could take over the publication. I told him that if the Board of directors of WERC agreed. I would be happy to undertake it.

The task entrusted to me needed expertise in the law. I discussed this with Professor Savitri Goonesekere, who welcomed the project but confessed that she is too busy with her own work to help in this task. She recommended Mr. Shivaji Felix from the Faculty of Law at the University of Colombo. He has studied Thesawalamai and was happy to be associated with WERC in this task. In spite of various calls on his time, he patiently and with great dedication did his duty classifying, arranging and editing the contents of the manuscripts. We are grateful to him and to Professor Goonesekere for recommending him.

Dr. Tambiah had previously entered into an agreement with the Colombo Tamil Sangam for the publication. I contacted Mr. Gunaratnam, the President of Colombo Tamil Sangam, at that time and he readily agreed to let WERC publish the book.

Having cleared many hurdles we needed some one with legal expertise to proof-read it. Mr. J. M. Swaminathan and Ms. Nelun Senanayake from the law firm Julius and Creasy, agreed to undertake the task "for the sake of Thesawalamai", and with this we completed the long journey.

Finally, Sunanda Seeli of WERC, who typed and retyped the manuscript and who designed the cover of this book, deserves our thanks. Our thanks are also due to the publishers Karunaratne & Sons who also worked with dedication with us to see through this project.

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PREFACE

The Thesawalamai or the Customary Laws of the Tamils of Jaffna has existed for well over a few centuries. During its period of evolution it had undergone several changes. The Dutch ultimately codified it, but the Dutch Code in itself was an imperfect collection of the usages of the Tamils of Jaffna. The provisions of the Thesawalamai Code are not arranged in a logical and systematic way. To foreign readers, the law of Thesawalamai presents a bewildering picture and appears to be fragmentary and lacking in coherence. So much so, one of our Judges described the Thesawalamai in the words of Tennyson as a "wilderness of single instances".

The Thesawalamai Code was translated by the British and has been in force for well over 150 years. Many of its provisions are either obsolete or replaced by statutory provisions and still others are difficult to understand. Some of the decisions of our Courts have tended to deepen the obscurity. Piecemeal legislation has brought about greater uncertainty. Hence, a systematic exposition of the Thesawalamai with a historical and critical approach was a longfelt necessity. This is the only apology that could be offered for the production of this work.

The preparation of this work has taken many years. In spite of pressure of work time had to be found to write this work. In Ceylon there is no central library and this perhaps is another contributory factor for the delay in producing the work. Many far-reaching changes have been brought about by recent legislation and the manuscript had to be kept back with a view to incorporate these changes. Hence, the reader would forgive me for the delay in producing the work.

A work of this nature is bound to have errors and many theories advanced by me may not be shared by others. The generous reader would overlook the faults and errors. It is hoped that the work would stimulate further discussions on many points which are unsettled.

The work is divided into four parts. The first part deals with the origin, history and application of Thesawalamai. The second part contains the Law of Persons. The third part discusses the Law of Property and the fourth part treats the Law of Obligations. The Hindu Law of Temporalities is discussed in the appendix. For ready reference the Thesawalamai Ordinance and other important Ordinances dealing with Thesawalamai have been added. Ordinance No. 58 of 1947 is discussed in appendix VI.

In the preparation of the work my acknowledgement is due to a number of persons. I should thank the Librarians of the Ceylon Archives, the Museum Library, the University Library, the Law Library and my numerous friends who have lent their books, for the assistance they have rendered me.

It is my duty to thank Sir Ivor Jennings, K. C. LL.D., D. Litt., Vice-Chancellor of the University of Ceylon, for reading the manuscript and giving me useful suggestions. My thanks are due to Professor F.J. Soertsz, K.C., retired Senior Puisne Justice of Ceylon, for reading through the manuscript and for giving me a foreword. I should thank Mr. E.W. Perera for many useful hints he has given me on the chapter on Caste System.

I should thank Mr. Joseph, B.A., LL.B., (Lond.), Advocate, and Mr. J.C. Thurairatnam, Advocate, for perusing the proof and verifying the references and for preparing an index. It is my duty to thank Mr. Sharvananda, B.A.(Lond.), Advocate for verifying the authorities cited in the Appendix I, and Mr. S. Thangarajah, B.A., LL.B. (Lond.), Advocate, for the assistance he has given in preparing the general index. I should thank Mr. Canjemanathan, Advocate, for perusing and correcting the proof in its various stages. I should thank my wife for the encouragement she has given me to write this work. Lastly, I must thank Mr. W. H. James, of "The Times of Ceylon," for the care and consideration shown in printing this work.

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INTRODUCTION

One of the principal problems associated with *Thesawalamai* is that the concept has been greatly misunderstood with the necessary consequence that incorrect inferences have been drawn. Dr H. W. Tambiah believed that resistance towards the devolution of power in the Northern Province was significantly influenced by misconceptions regarding the true nature of the law of *Thesawalamai*. It was his view that it was only possible to remove such misconceptions if people were educated about the origin, history, and significant aspects of the law of *Thesawalamai*.

Dr H W Tambiah's seminal work, *The Laws and Customs of the Tamils of Jaffna*, now in its second edition, has contributed, no doubt, in a significant manner to dispel some of the myths surrounding the *Thesawalamai* (occasioned, perhaps, by a lack of appreciation of the basic principles which underpin this special law).

Thesawalamai is, essentially, a customary law which is both territorial and personal in character. The former characteristic of this law manifests itself by the fact that it is applicable to all lands situated in the Northern Province (whether such land is owned by a Sinhalese, Tamil, Muslim or Burgher).¹ The latter characteristic, on the other hand, results in *Thesawalamai* being applicable, as a personal law, to Tamils who have an inhabitancy in the Northern Province.²

1. See, e.g., Tambiah, H. W., *Principles of Ceylon Law* [Colombo: H. W. Cave & Company, 1972] at p. 205.

2. See, e.g., *Sivagnanalingam v. Suntheralingam*, [1988] 1 Sri L. R. 86; see also, Selvakumaran, N., 'The Applicability of Thesawalamai: *Sivagnanalingam v. Suntheralingam*', (1990) 7 Colombo L. R. 148, for an analysis of the implications of this important decision of the Supreme Court.

The Thesawalamai Code of 1806 attempted to codify "the customs of the Malabar inhabitants of the Province of Jaffna." The *Thesawalamai*, as a personal law, when compared with the general law, applicable at that time, was indeed a superior legal system. Yet one of the inevitable consequences of attempting to codify a customary law is that its evolution is frozen in time. As a result, with changes in social, cultural, commercial and legal norms and practices, the codified law finds itself unable to keep abreast of current developments; it lacks the open textured nature of a customary law which can evolve, adapt and be innovative when faced with new situations or changed circumstances.

It is of course doubtful whether the *Thesawalamai* Code in fact contains an accurate distillation of the laws and customs applicable to the Malabar inhabitants of the province of Jaffna. This is because a close scrutiny of the Code reveals that it has certain curious features which appear to be incompatible with the customs that were, probably, prevalent at that time. For instance, the majority of the inhabitants of the Northern Province were Hindus and the rites and customs of the Tamils, particularly those relating to customary marriages, were compatible with those of the Hindu religion. Yet the *Thesawalamai* Code reveals a profound Christian influence. For example, section 17 of the Code makes reference to a situation where a 'Pagan' gets married to a Christian woman and section 18 to a situation where 'two Pagans' intermarry. Thus, it can be seen that the *Thesawalamai* Code, by referring to Non-Christians as 'Pagans', was in fact adopting terminology consonant with the value system of the ruling elite of the time. Yet, it seems to give the impression that Christianity was the religion of the majority of the inhabitants of the Northern Province.

The *Thesawalamai* Code indicates that it was cross-fertilized by the jurisprudence of many other systems of law. Tambiah recognized that the Code was, indeed, influenced by other legal systems and specifically adverted to this fact:

The customary laws of Thesawalamai appear to have been moulded by various other systems of law such as Hindu law, Mohammedan law and Roman-Dutch law. The Dutch and the Portuguese changed the customary laws in certain respects and therefore it is not surprising that, when codi-

*fied by the Dutch, Thesawalamai could be described in the words of Tennyson as a 'wilderness of single instances.'*¹

The word '*Thesawalamai*' in fact means customs of the land; however, the origin of the law of *Thesawalamai* can be traced back, on the basis of historical research on this score, to the customs and usages of the Dravidians from the Malabar coast of India.² Yet, the Code incorporates significant influences of other legal systems, notably that of the Portuguese and the Dutch.

Walter Pereira³ adverting to the scope of *Thesawalamai*, as a special system of law, states as follows:

By Regulation No. 18 of 1806 it was provided that the "Thesawalamai, as collected by order of Governor Simons in 1706 should be considered to be in full force, and that all questions between Malabar inhabitants of the said Provinces or wherein a Malabar inhabitant is defendant should be decided according to the said customs."

Thus, the *Thesawalamai*, in its capacity as a personal law, only applies to a person who is a Malabar inhabitant of the Northern Province (often referred to as the Province of Jaffna). Yet, inhabitancy of the Northern Province does not mean that a person has to be continuously maintaining such an inhabitancy. Once an initial inhabitancy has been established, as a matter of fact, then, the continuance of such an inhabitancy is presumed unless it can be clearly demonstrated that a person intended to abandon such an inhabitancy.

This principle was laid down in *Sivagnanalingam v. Suntheralingam*,⁴ where Sharvananda, C. J., delivering the judgment of the Supreme Court, expressed the view that the test to determine whether one was subject to *Thesawalamai* was based on whether one maintained a Jaffna inhabitancy. In this case, the deceased lived, worked and died in Colombo but it was the

1. Tambiah, H. W., *Principles of Ceylon Law*, op. cit., at p. 199.

2. See, e.g., Tambiah, H. W., *The Laws and Customs of the Tamils of Jaffna* [2nd edn., 2000] at p. 5; Cooray, L. J. M., *An Introduction to the Legal System of Sri Lanka* [Colombo: Lake House Investments Ltd., 2nd edn., 1992], at p. 140.

3. Pereira, James Cecil Walter, *The Laws of Ceylon* [Colombo: Government Printer, 2nd edn., 1913] at p. 15.

4. [1988] 1 Sri L. R. 86

view of Sharvananda, C. J., that once it was established that a person had an initial Jaffna inhabitancy an intention to abandon such an inhabitancy should not be lightly presumed; the burden was cast upon the person who asserts such a fact to unequivocally demonstrate that such an abandonment had taken place. His Lordship adverted to this principle in the following terms:

In view of the admitted fact that the deceased was a Jaffna Tamil who started life as an inhabitant of Jaffna, the burden lay on the Respondent to rebut the presumption of continuance of the inhabitancy by leading unequivocal evidence of abandonment of that inhabitancy. The presumption prevails until abandonment of that inhabitancy is established.

It is a grave misconception of the law to suppose that any person who happens to be a Jaffna Tamil is subject to *Thesawalamai*. A person is subject to *Thesawalamai* based upon his inhabitancy and the continuance of such an inhabitancy. As Tambiah quite correctly points out, in chapter XXVI, dealing with the future of *Thesawalamai*, "there is no presumption that any Tamil is governed by *Thesawalamai*."² He asserts that it is wrong to assume that the *Thesawalamai* is based upon a "homeland theory" as propounded by some politicians.³

Yet another misconception relating to the *Thesawalamai*, dealt comprehensively by Thambiah in this work,⁴ relates to the law of preemption. It is widely believed that the Sinhalese cannot buy land in Jaffna and that such a law exists in order to ensure that the land remains within the same family or community. Yet what is contemplated by the law of preemption is that a co-owner or prospective intestate heir should have a preferential right to purchase the land in question; if the persons who are able to preempt refuse to purchase the land, then, it can be purchased by anyone else. Preemption does not result in a prohibition on the alienation of land except to certain specified persons. It is submitted that this belief is based upon an inadequate appreciation of the law of preemption. It should also be noted that any person could buy land in the Northern Province if he or she was prepared to pay a higher price than the persons who are entitled to preempt.

1. at p. 95

2. See, pp. 258 -259

3. Page 259.

4. See, e.g., Chapter XVII and XVIII

Preemption would also benefit Non-Tamils¹ because the operation of the law of *Thesawalamai*, in this sphere, is territorial in character. This aspect of the *Thesawalamai* is not a personal law confined to Tamil inhabitants of the Northern Province: any person, irrespective of his race, owning land in the Northern Province has to comply with the postulates of the law of preemption.

The law of *Thesawalamai*, being a codified law, has, however, been unable to evolve with time nor take account of changes in the type of property held by individuals such as stocks, shares, bonds and foreign currency and other types of investments. For example can a woman subject to *Thesawalamai* instruct her stock broker to buy or sell shares on her behalf without the consent of her husband? Can a woman subject to *Thesawalamai* open and operate a Resident Foreign Currency Account in her own name without the consent of her husband?

Thesawalamai has also been unable to adapt to the fact that men and women are today separate taxable entities and are required by law to maintain separate records of their assets, liabilities, income and expenditure for tax purposes. Additionally, many women subject to *Thesawalamai* are today professionally qualified and are earning separate incomes. Thus, the role of the husband as the sole and irremovable attorney of the wife may be an area which is ripe for review with a view for reform. It is ironic, for example, that a woman subject to *Thesawalamai* can function as a Chartered Accountant or investment advisor and deal with millions or billions of rupees in investments on behalf of her employer firm but is unable to do the same in regard to her own personal investments.

There is no doubt that if the *Thesawalamai* was not codified it would have evolved with time so that it took account of the changes that were taking place in society. Yet a codified law is unable to do so and must change either with the assistance of legislative intervention or judicial creativity so that it is socially relevant.

Aristotle believed that all natural phenomena were in a state of perpetual change. As an acorn developed into a mighty oak tree the oak tree was the acorn's predetermined end; it was the fulfillment of the progression

1. See page 259.

that the acorn had started: the earlier stages always lead up to a final development. Yet one must not think of this end as a termination. The process of change is constant. In everything there is a potentiality striving to reach a further stage of actuality.

The law of *Thesawalamai* must also strive towards reaching its predetermined end. A customary law which is codified, unless regularly amended, will not be able to fulfill the aspirations and expectations of the society in which it exists. The process of change must be constant; the law of *Thesawalamai* must evolve and adapt to such change.

Shivaji Felix

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All.	Allahabad
A.I.R.	All India Reports
Ap.	Appendix
Bal. }	Balasingam' notes of cases
B.N.C.)	..	..
Bal. Rep.	..	..	Balasingam's Reports
Bom.	..	..	Bombay
Browne	..	..	Browne's Reports
Cal.	..	..	Calcutta
C.A.C.	..	..	Court of Appeal Cases
C.L.R.	..	..	Ceylon Law Recorder
C.L.W.	..	..	Ceylon Law Weekly
Curr. L.R.	..	..	Current Law Report
C.W.R.	..	..	Ceylon Weekly Reporter
D.B.U.J.	..	..	Dutch Burghur Union Journal
L.E.	..	..	Legislative Enactments
F.B.	..	..	Full Bench
H.C.R.	..	..	High Court Reports
I.A.	..	..	Indian Appeals
I.C.	..	..	Indian Cases
I.L.R.	..	..	Indian Law Reports
Lah.	..	..	Lahore
Lor.	..	..	Lorensz Reports
L.R.	..	..	Law Reports
L.J.	..	..	Law Journal
Mad.	..	..	Madras
Marsh.	..	..	Marshall's Reports
Morg.	..	..	Morgan's Reports
M.	..	..	Muttukrishna's Thesawalamai
M. I. A.	..	..	Moore's Indian Appeals
M.H.L.	..	..	Maine's Hindu Law
Nag.	..	..	Nagpur
N.L.R.	..	..	New Law Reports
Pat.	..	..	Patna
P.C.	..	..	Privy Council
Ram. }	..	..
Ram. Rep.)	..	..	Ramanathan's Reports
Rang.	..	..	Rangoon
S.C.C.	..	..	Supreme Court Circular
S.C.	..	..	Supreme Court
S.C.R.	..	..	Supreme Court Reports
Sri, L.R.	..	..	Sri Lankan Law Reports
Sc. Ap.	..	..	Scottish Appeals
Thamb.	..	..
Tam.	..	..	Thambiah's Reports
T.H.	..	..	Reports of Witwaters and High Court(Transvan) Colony
Times	..	..	Times Law Reports
W.R.	..	..	Weekly Reporter
W.R.P.	..	..	Weekly Reports, Punjab

CHAPTER I

THE ORIGIN OF THESAWALAMAI

THE LEGAL SYSTEM OF CEYLON

The people of Ceylon are governed by a variety of Laws. Though the common Law of the Island is the Roman-Dutch Law, yet in many matters other system of Law are applicable. When Ceylon was taken over by the British, His Majesty, George III, declared by Proclamation, dated 23rd September, 1799, that "the administration of Justice and Police in the settlements of the Island then in His Majesty's dominion, territories and dependencies thereof, should be henceforth and during His Majesty's pleasure, exercised by all courts of judicature according to the Laws and institutions that subsisted under the Ancient Government of the United Provinces, subject to any alterations which the Governor may by Proclamation make from time to time". The Kandyan territory was ceded to Britain by the Convention of 2nd March, 1815, and by it, was saved to all classes of the people "the safety of their persons and property, with their civil rights and immunities, according to the laws, institutions and customs established and in force amongst them". Thus, in Ceylon, as Walter Pereira remarks¹, no less than five systems of Municipal Laws were given the Royal sanction. These were the Roman-Dutch Law,² the Thesawalamai or customs of the Malabar inhabitants of the "Province of Jaffna," the laws and usages of the Mussalmans, the Mukkuva Law

1. Walter Pereira, Laws of Ceylon (2nd Edition), p. 3.

2. The old Statutes of Batavia were introduced during the Dutch era by resolution of the Governor - General dated 3.3.1666 (see Article on Roman - Dutch law by Frederick Chans' Dutch in Netherlandia. March, 1915/64. D.B.U.J., Vol.54, p.62)

or the customs regulating intestate succession to property among the Mukkuvas of Batticaloa and the Kandyan Law. From time to time the Law of Ceylon has been altered by legislation,¹ In some cases the English law has been bodily introduced. Many Ordinances are based on English statutes and in interpreting these Ordinances the English Law is often resorted to. English law has also been adopted tacitly in many rulings of our Courts.

THESAWALAMAI - A CUSTOMARY LAW IN ITS ORIGIN

The Thesawalamai is a particular law applicable to the "Malabar inhabitants of the Province of Jaffna". Before it was codified by the Dutch, it was a customary law applicable to the Tamils who inhabited the Jaffna District. It has prevailed in North Ceylon for several centuries, ever since that part was colonised by the Tamils, who migrated many centuries ago from the different districts of South India. Lawyers and jurists have spent their energy and time in trying to trace the origin of this system of law. Some have given up the quest as a vain one; others have arrived at speculative theories which, though extremely interesting, are not supported by historical facts. Hence, the attempt is here undertaken to trace the origin of Thesawalamai. In discussing this moot question, we cannot be dogmatic in our assertions. But the task is greatly simplified when the etymology of the word "Thesawalamai" is examined. Thesawalamai literally means "Customs prevailing in the country."

Therefore, in dealing with the origin and growth of Thesawalamai, it is necessary to consider the manner in which customary usages originate and develop in societies. At the outset of our inquiry we may pause to ask the question, what are meant by customary usages? This question is admirably answered by Paul Vinogradoff. He says "Custom as a source of law comprises legal rules which have neither been promulgated by legislators nor formulated by professionally trained judges but arises from popular opinion and are sanctioned by long usage."² Primitive law is to a large extent based on custom. With the progress of society, customary rules are gradually displaced by express legislation and by rules elaborated by trained lawyers and judges. The Roman law consisted of customary usages before it was codified. The earliest code of the Romans, the XII Tables, was a collection of the customary usages of the Romans. Once any system of law is codi-

1. See The Civil Law Ordinance (Cap.66).
2. Common Sense and Law by Paul Vinogradoff, page, 148.

fied, to use the words of Sir Henry Maine, a process of conscious development takes place. The law is later improved by other agencies. We shall see how true the words of Sir Henry Maine are when we consider the development of Thesawalamai.

The Origin of Custom

Various theories have been advanced regarding the origin of custom. Dr. Allen says, "No problem in Jurisprudence, except perhaps that of corporate personality, has given rise to more lively controversies than the origin of Custom."¹ According to Sir Henry Maine, in primitive society, kings gave awards in particular disputes that came before them. Those kings claimed to be divinely inspired. When similar awards were made under the same circumstances the germ of a Custom was found. To cite his inimitable words, "Parities of circumstances were probably commoner in the simple mechanism of ancient society than they are now in the succession of similar cases awards are likely to follow and resemble each other. Here we have the germ or rudiment of a custom."² This interesting and highly speculative theory of Maine's is not shared by contemporary jurists. Keeton remarks, "Although custom is an early source of law, it is not always the earliest, being preceded in some cases by judicial sentences, though judicial decisions may themselves originate in pre-existing custom."³ According to the historical School of Jurisprudence led by Savigny, Puchta and Gierke, it is widespread conviction or practice that generates custom. But these jurists are themselves unable to explain the existence of local customs which are rather parochial in outlook and consequently cannot be the outcome of widespread conviction. Holland says that "customs originated generally in the conscious choice of the more convenient of two acts, though sometimes in the accidental adoption of one of two indifferent alternatives; the choice in either case having been deliberately or accidentally repeated till it ripened into habit."⁴ "There is no juristic reason," says Holland, "for its taking one direction rather than another, though doubtless there was some ground of expediency, of religious scruple, or of accidental suggestion."⁵

1. Allen, *Law in the Making* (2nd Edition), p.38
2. *Maine's Ancient Law*, (Pollock's Edition), p.3
3. Keeton. *Elements of Jurisprudence*, p. 50
4. Holland (*Jurisprudence*), p. 57.
5. *ibid*.

Holland's view is perhaps the more correct one. One cannot, however, dismiss the other theories as unworthy of consideration. It must be observed that the origin and germ of a custom must be found in the primary instincts of human beings. Hobhouse says,¹ "We know, for instance, how customs change and grow and disappear unconsciously as an individual stretches a point here or makes a new application of a precedent there. We can see how the interaction of multitudinous forces transmutes custom and produces a new tradition before anyone has been aware of the change, and we have no difficulty in conceiving the original growth of custom out of inherited impulses of gregarious man as proceeding along the same general lines."²

When once a certain course has been adopted the question may be asked as to why it should be repeated till it ripens into a binding custom. The answer to this question lies in the instinct of imitation which every human being has inherited from his anthropoid ancestors. In man the principle of imitation is very strong.³ It is said that "nature perpetuates itself by repetition and the three fundamental forces of repetition are rhythm, generation and imitation." Many of our social habits are attributable to this instinct of imitation. The reason why a certain course of conduct, once observed, is repeated till it ripens into a custom is to be found in the fact that this instinct is innate in every human being. Dr. Allen has shown that it is the imitative faculty which should be reckoned as the chief factor in the propagation of a custom.⁴

"Not infrequently institutions spread like a craze; and this is true not only of isolated usages but of whole codes of laws," says Dr. Allen.⁵ Whatever may be the origin, the imitative urge referred to by Dr. Allen is clearly visible in the Thesawalamai. When the Thesawalamai is examined, the influence of several foreign systems of law can be observed.

Thesawalamai originally was a Collection of Dravidian Usages.

Recent researches have shown that the Thesawalamai originally was a collection of Dravidian usages. Maine, while considering the nature of the

1. "Morals in Evolution," by Hobhouse. p. 616.
2. See also "The Paradoxes of Legal Science" by Cardozo, p. 43 (Columbia University Press).
3. Descent of Man by Charles Darwin (Thinkers Library), p.79.
4. Allen, p.65 (Law in the Making). (2nd Edition)
5. Allen., p.66.

Thesawalamai, says, "The customs recorded in the Thesawalamai may therefore be taken as strong evidence of the usages of the Tamil inhabitants of South India two or three centuries ago, at a time when it is certain that those usages could not be traced to Sanskrit writers.¹ Maine has shown that many such customary usages exist even today in South India. They may be found in "The Madura Manual" by Nelson, "The Malabar Manual" by Lorgon, "The North Arcot Manual" by Cox, "The South Canara Manual" by Hurrock, and "The Manual of Administration and Report of 1871" by Dr. Cornish.

In considering the Dravidian usages, Maine says, "We also know that the influence of Brahmans or even of Aryans among the Dravidian races of the South have been of the very slightest, at all events until the English officials introduced their Brahman advisers."² After referring to the Thesawalamai in support of this proposition, he says, "The suggestions derivable from the Thesawalamai may now be supplemented from the information drawn from the records of the Pondicherry Courts. The early tribunals of this settlement being gifted with a fortunate ignorance of Hindu law, had been in the habit of referring questions depending upon that law to the decision of the leaders of the caste, or of other persons supposed to possess special knowledge of the laws or usages bearing on the case."³ It can be reasonably presumed that the Thesawalamai had a similar origin. The fact that Claas Isaaksz sought the assistance of the twelve Mudaliyars who were leading citizens shows that this collection of laws was known to a privileged class in whose awards the origin of the Thesawalamai may be found.

Maine has also ably shown that these Dravidian usages were not based on Hindu Law, but that on the other hand many basic principles of Hindu Law are based on these Dravidian usages. He says, "On the other hand, while I think that Brahmanical Law has been principally founded on non-Brahmanical customs so I have little doubt that those customs have been largely modified and supplemented by that Law. Where two sets of usages not wholly reconcilable are found side by side, that which claims a divine origin has a great advantage in the struggle for existence over the other."⁴ It is thus that the Hindu Law imposed itself on Dravidian usages, and hence one finds undoubted traces of Hindu Law in Thesawalamai. But the roots of the Thesawalamai are not to be found in Hindu Law.

1. M. H.L., p.50. 7th Edition
2. *ibid.*
3. *ibid.*
4. M.H.L., p.11

It has been shown by writers of eminence on Hindu Law that the Hindu Law is derived from the customary laws of India. Thus, Ganapathy Iyer says,¹ "It will thus be seen that the Hindu Law as contained in the Code and other Sanskrit writings is not a myth but it is based on immemorial usage and that the Brahmanical writers never could have supplanted and none did supplant these usages by laws of their own fancy although they might have been instrumental in developing the law to suit the growing needs of the society of their time." Maine² says, "I think it impossible to imagine that any body of usage could have obtained general acceptance throughout India merely because it was included by Brahman writers or even because it was held by the Aryan tribes. In Southern India, at all events, it seems clear that neither Aryans nor Brahmans ever settled in sufficient numbers to produce any such result. In support of his statement he takes three distinctive features of the Hindu Law, viz., the undivided family system, the law of inheritance and the practice of adoption and shows how the early history of these branches of the law and their main features had nothing to do with Brahmanism."

Ganapathy Iyer, after a close analysis, takes the view that the Hindu Law, the Burmese Law, the Thesawalamai and the customary laws of Punjab have a close resemblance. After considering the similarity between the Code of Manu and Burmese Law, he says³ "The Burmese Law must have the same common source as the Hindu Law of the Aryans in India though the developments (owing to the influence of Buddhism) must have been on different lines. So also, the rules in the Thesawalamai, a compilation of Tamil customs made in 1707 A. D. by the Dutch Government of Ceylon closely resemble the customary laws prevailing in the Punjab and traces of a common origin of the rules in the Thesawalamai and the Hindu Codes are easily discernible. According to the Thesawalamai a distinction is drawn between hereditary property, acquired property and dowry which respectively correspond to ancestral property, self acquired property and *Stridhanam* of the Hindu Law although the incidents attaching to each of these may not be the same under the five systems. The hereditary property goes to the sons and the *stridhanam* to the daughter according to the Thesawalamai as under the Hindu Law. Marriage among the Brahmin Tamils in Ceylon has the same essential features as

1. Ganapathy Iyer on Hindu Law, Vol.1, p.36.

2. M.H.L., 9th Edition, p.4.

3. See Hindu Law, Vol.1 by Ganapathy Iyer, pp.35 and 37.

it has in Southern India. The marriage is celebrated when the children are too young to form an opinion and no divorce is possible. A woman can marry but once and cannot make another alliance even after the death of the husband. (Thesawalamai 204, 205). In the case of some other castes, however, divorce seems to have been recognised. But the practice of tying the *Tali* and the performance of some ceremony such as 'homam' seem to prevail universally. Adoption is recognised as an institution as under the Hindu Law. A perusal of the edition of the Thesawalamai by Muttukrishna will show how many of the rules contained therein find their counterpart in the Hindu law. The reference to the Law of Malabar frequently made in the books is apparently to the Hindu Law as prevailing in Travancore." Thus according to these writers the Thesawalamai and the Hindu Law have had a common origin. They both sprang from the customary usages of the people of India.

We shall next consider the close similarity between another system of customary law which was prevailing among the Mukkuwas of Batticaloa and the Marumakattayam Law, the law of the Malabars in India, in order to show that the Marumakattayam Law as it existed in the 2nd Century A. D. in India was almost identical with the Mukkuwa Law of the Mukkuwas of Batticaloa and India. We shall attempt to show that Thesawalamai is derived from the old Marumakattayam Law.

Marumakattayam and Mukkuwa Law

There is a great similarity between the Mukkuwa Law and the Marumakattayam Law. Before comparing the Marumakattayam Law and the Mukkuwa Law, some of the basic principles of Mukkuwa Law as laid down by Brito in his work entitled "The Mukkuwa Law"¹ may be stated:-

- (i) All inheritance is claimed in Mukkuwa Law from the mother.
- (ii) Succession is traced through the mother.
- (iii) *Muthusam* land (ancestral property) is kept out of marital power.
- (iv) The mother's eldest brother is the manager of the *kud* which forms the family unit.
- (v) The manager is bound to support the mother.
- (vi) Women hold no land.

1. Brito, p. 57

- (vii) The most valuable movables go to the males.
- (viii) A man's Muthusam devolves on his sister, his only undoubted relation, on the principle that a mother makes no bastard.

Brito in discussing the origin of Mukkuwa Law says that marriage was unknown in the Mukkuwa society. He says, "In a state of society in which there was no marriage, natural prudence would dictate to the female the expediency of securing means of livelihood by requiring every male to give up whatever he earned during the period he continued to visit her. And when the female died, everything she left went naturally to her children and was so naturally divided among all her sons and daughters alike. The daughters would continue to earn from their lovers in the same manner as their late mother did, and would transmit their *theddham* and *muthusam* to their issue, male and female alike."¹ The males, on the other hand, had to leave to their sisters all that they could not easily carry away with them. They had no children, and they did not leave any *theddham* (acquisition); so that *muthusam* (ancestral property) went to their sisters, their only undoubted relations.² After some time when the man in the exercise or abuse of his superior strength began to tyrannize over the woman, her property was placed under the control of her brothers, and even her sons.

"All the modern rules of Mukkuwa succession", says Brito, "seems to be but mere adaptation of the foregoing principles to suit the requirements of the civilised commerce which now obtains between the sexes." He adds that the Mukkuwas have along abandoned their polygamous and polyandrous practices. The system of society among the Malabars may here be conveniently considered before an attempt is made to compare the Mukkuwa law and the Marumakattayam law. Lewis Moore, in his book entitled "Malabar Law and Custom," says, "It is generally agreed by European writers that the system of inheritance in the female line prevalent among the Nayars must have originated from a type of polyandry resembling what is termed free love.... The ancient rule was that the woman should remain in her own house and be visited by her so-called husband, and that the eldest female should be the head of the *tarward*. Time has brought about modifications in this system, and in Malabar, though not in Canara, the eldest female has given way to the eldest male.... Polyandry indeed may now be said to be almost extinct."³

1. Brito, p. 42.

2. *ibid.*, 43.

3. Moore, p. 57.

It is clear from the description of the structure of these two societies that their basic institutions are almost identical. When we consider the systems of law obtaining among these two societies we are again struck by their remarkable similarity. Both consist of customary laws. In the Marumakattayam law the unit of society is the *tarward* which, as Logan remarks, corresponds pretty closely to what the Romans called a *gens*; with this important distinction, however, that whereas in Rome all the members of the *gens* traced their descent in the male line from a common ancestor, in Malabar the members of a *tarward* traced their descent in the female line from a common ancestress.¹

In Mukkuwa law the *kudi* is the unit of society. Brito defines *kudi* thus: "The term 'Kudi' is used by all the Tamil-speaking classes of Batticaloa to mean every person who is related to one on one's mother's side only. Persons of the same *kudi*, however distantly related they may be, recognised each other as relations. Beyond one's father and his immediate relations, one scarcely recognises any relations in one's father's *kudi*. *Vayittuvar* is a term used in Batticaloa as a synonym for *kudi*, generally among the Karaiyars, and among other classes, too occasionally, *Vayittuvar* means "womb tie." It is derived from *vayiru* (womb) and *var* (tie or band). So that in Mukkuwa law, too the descent is traced through females from a common ancestress.

In the Marumakattayam Law, children of the males do not belong to their father's *tarward*; they belong to the *tarward* of their mother.² Similarly, in Mukkuwa Law the children belong to the mother's *kudi*, for no Mukkuwa child ever knew his father.³ In Marumakattaya, Law, the most senior male member of the *tarward* is the *Karnaven* that is to say the manager.⁴ According to the Aliya Santana system, the most senior member, whether male or female, known respectively as (*ejamanthi*) *yaman* or *yamanthi*, manages the family.⁵ In Mukkuwa Law the brothers are managers or trustees of their sister's property. Sons do not become managers of their mother's property they only become managers of their sister's property. The elder brother is the supreme

1. Logan's "Malabar Manual" Vol.I, p.152,153,

2. Pakkaran v. Pathumma Umma, A.I.R., 1930, Mad.541

3. Brito, p.43.

4. Moore, p.95.

5. M.H.L., p. 969 (10th Edition).

manager. In Marumakattayam Law there was the distinction between separate and self-acquired property on the one hand, and ancestral property on the other hand distinction is between ancestral property (*muthusam*) and acquired nearest heirs are the children and lineal descendants in the female line.¹ In Mukkuwa law, too, inheritance is claimed through females.² When a woman dies leaving immovable *muthusam* property to her children, the dominium descends to her daughters in equal shares. If any daughters have predeceased her, the shares of those daughters descend to the *penvalli urumai penpillai*,³ that is to say, a female heir from a female heir. Again, in Murumakattayam Law, a male is succeeded by his sister's children. In Mukkuwa Law, too property descends from the male *marumakkal* directly; that is to say, to the sister's children directly.⁴ Further, the powers of the *karnaven* of a Malabar *tarward* are practically the same as the powers of the managers of a *kudi* in respect of the maternal *muthusam*. All these facts go to show that these two systems are so similar, that one wonders whether, in fact, they did not have a common origin.

Lewis Moore, in his "Introduction to Malabar Law and Custom," says, "The only indigenous people of Malabar who have not been mentioned are the Mukkuvars or fishermen of the coast." The rest, according to him, are all immigrants. The first wave of immigration brought the Tiyan, Illuvans and Shanars. The word *Tiyan* is derived from Dripam and signifies as islander; the word *Illuvan* is derived from *Illam* (Ceylon).⁵ The next wave of immigration brought the Nayars, a military division of the Dravidian tribes. The Nayars were serpent worshippers.⁶ The third wave brought the Nambudri Brahmins. This was probably in the first three centuries of the Christian era. There is also high authority for the statement that people who speak the Malayalam tongue were originally Tamilians who spoke Tamil.⁷

The Mukkuvars of Ceylon are Tamils who belong to the fisher caste. They are said to have migrated from the Malabar coast before the Christian era. The term *Mukkuva* itself is a Malayalam word. This suggests that the Mukkuwa Law represents the usages of the Mukkuvars who lived in Malabar about the second century A. D. It has been suggested that the polyandrous stage of society in Malabar was introduced by the Nayars in order that they may not have the cares of the family. It has also been

1. M.H.L., p. 973. (10th Edition)

2. Brito., p.44.

3. *ibid.*, p.29.

4. *ibid.*, p.12.

5. Moore, p.1

6. *ibid.*, p.1

7. See Caldwell's "Dravidian Grammar," p.16.

suggested that the Numbudri Brahmins introduced this system to satisfy their lust.¹ The Mukkuvars themselves appear to have had this system, and it is more probable that the Nayars and numbudri Brahmins adopted the laws and customs of the indigenous people, the Mukkuvars. From what has been stated above it may be said that the Marumakattayam Law and the system known as *Aliyasantana Law* are the twin daughters of Mukkuwa Law, which was the law which obtained in ancient Malabar. We shall next consider the close resemblance between the Thesawalamai and the Marumakattayam Law.

Thesawalamai and Marumakattayam Law

There is remarkable similarity between the Thesawalamai and the Marumakattayam Law. Before attempting to compare the incidents of the two systems we may state the views of the late Mr. V. Coomaraswamy, one of the most erudite Tamil scholars of Jaffna, in a series of articles he contributed to the "Hindu Organ." In his first article he says "The reader would have noticed that in the passage quoted from the correspondence in connection with Dutch compilation, the customary law of Jaffna is referred to as Malabar laws, and customs, and the people themselves as referred to as the Malabar inhabitants of Jaffna."²

"In a footnote appended to a Thesawalamai case reported in the New Law Reports,³ the late Sir P. Ramanathan questioned the propriety of Thesawalamai being styled the law of the Malabar inhabitants, and considered it a misnomer, in view of the history and tradition which ascribes to the ancestors of the Tamils of Jaffna a colonization from the Coromandel coast and not from the coast of Malabar."

"The reader must remember in this connection that the traditional accounts of our history as embodied in the Kalayamalai and the Vaipavamalai speak of two colonizations of Jaffna, an earlier one led by the latest Yalpadi, from whom the peninsula itself derived its name, and a latter one in the middle of the thirteenth century, when the Aryachakravarty established a kingdom in Jaffna."

The first colonization was on an extensive scale from the Malabar

1. See Moore, Ch. III.

2. See the article, "Thesawalamai - Its Genesis and Development," in the "Hindu Organ," dated, 19.6.1933.

3. *Tillainthan v. Ramasamy Chetty*, (4 N.L.R. 328 at 333.)

coast. These earlier colonists had done the arduous pioneer work of converting a dreary waste land into smiling gardens and had settled down in the villages and hamlets throughout the peninsula, many years before the second colonisation which consisted of a small band of chieftains, their relations, retainers and attendants, sparsely distributed and settled in some villages, among the larger community of earlier settlers for purpose of the civil and military administration of Jaffna and for the collection of revenue in the newly-established kingdom of Aryachakravarty.

"The description in the Dutch Thesawalamai Code of Isaaksz over-emphasised the earlier colonisation by calling it a compilation of the customs and usages of the Malabar inhabitants of Jaffna, leaving out of account the second colonisation of Jaffna altogether. The note of Sir P. Ramanathan in the New Law Reports demurring from the above appellation laid undue stress on the later influx from the Coromandel coast, completely ignoring the earlier colonisation. The customs and usages of the Malabar inhabitants constitutes no doubt the main basis and groundwork of the law of Thesawalamai, but the subsequent modifications and alterations made in Thesawalamai after the advent of those who hailed from the Coromandel coast are by no means inconsiderable. So that to have a clear perspective of the respective contributions of the earlier Malabars and the later Coromandel, the problems of colonisations, the customs of the colonists, the origin of Thesawalamai must be studied together and approached as much from the historic and ethnological standpoints as from the juristic aspects in their correction to one another."

In his next article¹ he deals with the dowry system as prevailing in Jaffna and the provisions of the Thesawalamai relating to it. After stating the incidents of the dowry system prevailing in Jaffna, he says - "All these principles are clearly traceable to a state of society in which the tendency was to tie down the property to the females of a family and pass it on to females from generation to generation." Then he proceeds to show that the ancient people of Malabar were the Tamils who lived in the ancient Chera kingdom. He says that owing to the geographical situation of Malabar, the people of that country could not readily mix with the rest of the Tamils in India, but were in constant touch with Ceylon as they were a seafaring people, so much so that Ceylon was called Serendip, that is to say, the island of the Chera King. Then he ably shows that it was the matriarchal system of society that prevailed

1. See "Hindu Organ" of 6.7.1933.

among the Malabars. Later,¹ he compares and contrasts the incidents of the Thesawalamai dowry law and the Hindu law of *Sridhana*, and comes to the conclusion that the former had an independent origin. He attributes the wide divergence between the *Sridhana* law of India and law governing *Chidenam* in Thesawalamai to the fact that the latter is an adaptation of the matriarchal system of succession which was in vogue among the Tamils at one stage of their social development. He proceeds to examine the fundamental provision of the Marumakattayam Law and the institution by which sometimes the husband or the father provided a separate house (*tavazhi illam*), and concludes that the dowry system is attributable to the adoption of this institution in Jaffna. The peculiar rules of the Thesawalamai that females inherit the property of females and that a dowried sister succeeds to another dowried sister are all attributable to the introduction of this institution in Jaffna; the well-known rule of Marumakattayam Law being that a *tavazhi illam* succeeds to the property of another *tavazhi illam* if members of the latter are extinct. Similarly, the right of a surviving husband to settle upon his daughter by way of dowry any portion of his deceased wife's property rests upon the theory of community of property of *tavazhi illam* over which the *karnaven* (manager) had the right of disposal. He says, "Many other matters of our Thesawalamai, such as the law of adoption which is now obsolete, can be assigned as having had their origin from Malabar. The law of *otty* mortgage and the law of pre-emption, both of which are peculiar to the Thesawalamai, were also adopted from Malabar."²

Though the advent of the poet "Yalpade" is treated as a myth by students of Ceylon History, they are agreed that a good portion of the settlers in Jaffna came from Malabar. Hence it is not surprising to find that there is a remarkable similarity between the Thesawalamai and the law of Malabar. The similarity appears to have been noted by Maine in his monumental work on Hindu Law. He says³ that "No attempt has ever been made to administer the law of the Mitakshara to the castes which follow the Marumakattayam Law in Malabar and the Aliya Santana Law in Canara, because it was perfectly well-known that these usages were distinct. Elsewhere the law is administered by native judges with the assistance of native suitors who seek for and accept it. If this law was not substantially in accordance with popular feeling, it seems

1. See "Hindu Organ" of 3.8.1933 and 23.10.1933

2. We have given the views of the learned writer to show that they support the theory enunciated by us regarding the origin of Thesawalamai.

3. M.H.L., p.3, 7th Edition.

inconceivable that those who are most interested in disclosing the fact should unite in a conspiracy to conceal it. That there is such an accordance appears to me to be borne out by the remarkable similarity of this law to the usages of the North of Ceylon as stated in the Thesawalamai."

Apart from authority, the similarities between the two systems of law are apparent to the student of the Thesawalamai. The fundamental difference between ancestral property and acquired property is recognised by the two systems of law. We have already seen that in Mukkuwa Law, too, the distinction is between *muthusam* (ancestral property) and *thediathettam* (acquired property), and that this distinction has its counterpart in Marumakattayam Law. The researches of the late Mr. V. Coomaraswamy reveal that the law governing dowry developed out of the customary practices prevalent among a matriarchal society, and the fundamental principles of this branch of law are taken from the Marumakattayam Law. Under the law of Thesawalamai the husband is placed in the same position as regards the members of his family as the *karnavin* is in regard to the members of his *tarward* in Marumakattayam Law. This explains the extensive powers of the husband over the acquired property and the dowry property. Just as the *karnaven* could effect a sale, mortgage or lease of the acquired property, so could the husband under the law of Thesawalamai sell, mortgage or lease it. Just as in Marumakattayam Law certain females were regarded as the head of the family, so under the law of Thesawalamai the mother stepped into the shoes of the husband and became the head of the family retaining the husband's power to deal with family property.

In the Thesawalamai, the power of the husband to give by way of dowry the property of his wife to his daughters even after the death of his wife is derived from the powers of the *karnaven* over property of the *tarward*. This power is given to the wife after the death of the husband, since she becomes the head of the *tarward* on his death. Similarly, the rule of Thesawalamai that if there are no parents alive, then the closest relations are given the power to give as dowry any property of the deceased parents, can be explained by the fact that in practice it was only the head of these families who would exercise the power; if the husband and wife were dead there was no person corresponding to the *karnaven* in the family, and hence the *karnavens* of the allied *tarwards* exercise this power.

The rule of Thesawalamai that on the death of a man's wife, if he married a second time, he must hand over the property of his former wife and

half of the *thediathettam* to the mother of his former wife, and also hand over the custody of his minor children to the maternal grandmother, could be explained on the footing that in a matriarchal society on the death of the wife her property and her children belong to her mother's *tarward*.

The rule that if a person wishes to give property to his nephews and nieces the consent of the close relatives must be obtained is derived from the Marumakattayam Law, under which system any gift by the *karnaven* must be with the consent of the members of the *tarward*, and, further, since a man's property originally went to his nephews and nieces, he was allowed to give property to them.

Many rules of inheritance are based on the matriarchal system of society. The peculiar rule of Thesawalamai that females succeed females and daughters succeed to the dowry of their mother is a rule intended to preserve the devolution of property in a matriarchal system of society. The rule in the Thesawalamai that a dowried daughter is excluded from the inheritance of the parents is based on the fact that on marriage a separate *tarward* comes into existence. The rule in Thesawalamai that on the death of a dowried sister without issue her property goes to the other dowried sisters is an adaptation of the rule of Marumakattayam Law that if one *tarward* becomes extinct it is succeeded by the other *tarwards*.

Many tenures peculiar to the law of Thesawalamai have their counterpart in Marumakattayam Law. The form of usufructuary mortgage peculiar to the Thesawalamai has its counterpart in Marumakattayam Law and is also called *otti* in that system. Its incidents are similar.¹

The leasehold known to the Thesawalamai appears to have its counterpart in Marumakattayam Law. The Thesawalamai Code states that in the absence of agreement, if the plants are supplied by the planter, the landlord gets two-thirds and the tenant one-third of the nett produce. In the form of lease known as *Virumpattam* in Marumakattayam Law, the tenant gets a third of the produce and the landlord gets two-thirds of the nett produce.²

The law of pre-emption in the Thesawalamai appears to have been taken from the Malabar Law. Kantawala in his thesis on the law of

1. Lewis Moore, p. 250 *et seq.*

2. Lewis Moore, pp. 191, 192.

Thesawalamai suggests¹ that since the law of pre-emption is unknown to the Hindu Law and is peculiar to the Mohammedan Law, and certain customary laws such as the Malabar Law, the Thesawalamai has borrowed the concept from the Malabars during the Portuguese period. The law of pre-emption was recognised by the Thesawalamai much earlier than the Portuguese period.

The law of pre-emption appears to have been recognised among the ancient Tamils. The late Mr. V. Coomaraswamy has ably shown that the right pre-emption given to an *otti* mortgagee was known in the time of St. Sundarar. Coomaraswamy says:² "The well-known Thevaram hymn of the Hindu St. Sundarar beginning "*Vittukolvir ottiyalan Virumpi Adpadan*" cannot be comprehended in all its import and significance unless you are familiar with both the *otti* and the pre-emption laws as obtaining under the Marumakattayam Law as well as under the Thesawalamai. Under both systems as *otti* holder has he right of pre-emption and an owner who sells his land without first redeeming the *otti* undergoes the risk of his sale being defeated by the *otti* holder claiming the right of pre-emption. Hence the stanza of Sundarar, means that Lord Siva has the free right of disposal over Sundarar as there is no outstanding right in anybody else as *otti* holder, or incumbrancer, who could raise a voice against such free disposal so far stating that he is an unencumbered property of his Lord: "I willingly surrendered myself and became thy slave forever, and Thou hast full dominion and plenary control." There is no other person to question it. But no master inflicts a wanton cruelty on his slave simply because he happens to have plenary control and there is nobody else having even subsidiary rights over that slave, and thus in a position to intervene on behalf of that slave against the doing of the Supreme Master. Hence Sundarar's lament is:

"The slave has done no wrong. But it pleases Thee, My Master to deprive me of my eyesight.

What reason canst Thou assign for inflicting on me the wanton cruelty of depriving me of my eyes? None! And therefore Thou standest condemned. (After so many entreaties from me you have restored me one eye)."

If Thou wouldst not restore me the vision of my other eye as well, may Thou prosper, my plenary Lord."

1. Thesis on the Thesawalamai by Mohan H. Kanatawala, printed at the Saiva Prakasa Press (Jaffna), p. 61

2. See "Hindu Organ" of 21.12.1933.

"It is worthy of note that St. Sundarar in his Thevaram hymns is often seen to display a felicitous knack of giving expression to the spiritual union between himself and Lord Siva, and illustrating them by instances of familiar occurrences in daily life. The stanza in question conveys such a truth by citing a system of legal tenure of property in vogue under the Marumakattayam Law, and the only excuse for explaining the whole stanza at length is that stanza forcibly brings out the restrictions imposed on the free sale of landed property when others of the community have minor rights as *otti*, co-ownership etc., which have given rise to the law of pre-emption, still a peculiar feature of the Thesawalamai Law. And the idea runs through the whole stanza down to the last line.¹ "This beautiful stanza of St. Sundarar shows that during his time the *otti* mortgage was known.

In the law of persons many marriage ceremonies practised in Jaffna are the same, as the *talikattu kalayanam* and the loose form of marriage known as *sambandam* known to the Marumakattayam Law. The Tamil word for marriage is in fact *sambandam*; the word *vivaha*, signifying marriage, being a Sanskrit term.² As pointed out by the late Mr. V. Coomaraswamy, many social customs of the Tamils can be traced to later Aryan influences. He says :- "The *homam* ceremony connected with the tying of the *talie* and giving of the *koorai* on the occasion of a Jaffna Hindu wedding is an Aryan rite. In the *tharathathan* gift and *kannikaithanam* gift ceremonies performed before the *talie* is tied; in the gifts carried in procession by the bridegroom to the bride's home on the wedding day; and in the *kumpiddake* gift by the mother-in-law and other inmates of the bridegroom's residence after the *urvalam* procession reaches the bridegroom's residence with the bride for the first time, we clearly discern the bride's price at the time of the nuptial fire (*homa*). The other kinds of the six gifts constitute the *stridhan* of the Manu Code."³

The law of adoption appears to be identical with that found in Marumakattayam Law. Maine, referring to the adoption known to the Thesawalamai, says: "It is a curious thing that this form of adoption which now exists in Mithilla and the Namburis of Western India is almost identical in its leading features with that at present practised in Jaffna. There is the same absence of religious ceremonies, the same absence of assumed new birth

1. See "Hindu Organ" of 3.8.1933, p.4.

2. Lewis Moore, p. 76.

3. "Hindu Organ," dated, 3.8.1933.

and the same rights of adoption both by husband and wife followed by the same results as of heirship only to the adoptee ... It seems plain that both the Mithilla and the Ceylon from arose from purely secular motives which existed anterior to and independent of Brahmanical theories."¹ As pointed out by Srinivasa Iyengar: "Adoption as a mode of perpetuating any *tarward* which is likely to become extinct has been recognised under the Marumakattayam and Aliyasantana systems from early times. The reasons and objects of adoption are wholly secular and not religious."² The law of guardianship in Thesawalamai is derived from the practices which obtained among a people who had the matriarchal system of society. This topic will be discussed later.

Origin of Thesawalamai

There is, therefore, a close resemblance between the Marumakattayam Law and Aliya Santana Law of India, and the Mukkuwa Law and Thesawalamai of Ceylon. The basic principles of their systems of law are so similar that we are forced to come to the conclusion that these laws are derived from some customary law prevalent among the ancient Dravidians. Father Heras' work on the Mohenjo-Daro inscriptions³ shows that the civilisation of the ancient Dravidians was one of the earliest civilisations known to the world, and the culture of the Dravidian had spread throughout India. Hence it is not a surprise to find similar customary usages existing in South India, Ceylon and North India. Thesawalamai, in its origin as stated earlier, was brought by the early Malabar immigrants to Jaffna and is an off-shot of the old Marumakattayam Law.

Influence of Foreign Systems of Law on Thesawalamai

Having traced the origin of some of the fundamental principles underlying the law of Thesawalamai, we shall proceed to estimate the influence of foreign systems of law on the Thesawalamai. The German Historical School said that law is essentially the product of natural forces associated with the *Geist* of each particular people; and nothing is more representative of these evolutionary processes than the autochonus customs which are found to exist in each community, and which are as indigenous as its *flora* and *fauna*. Allen, in attacking this theory, says - "Law is seldom of pure-blooded stock,

1. M.H.L., p. 260 (7th Edition).

2. *ibid.*, p. 975 (10th Edition).

3. Mohenjo-Daro and the Indus Civilization edited by Sir John Marshal, Vols. 1-3.

and 'national' is a dangerous word to use of almost any legal institution.¹ It is a well-known phenomenon that customary laws change when they come in contact with foreign systems of law." This theory of Dr. Allen is completely borne out when one considers the development of the Law of Thesawalamai. In turn every positive system of law that came in Contact with the Thesawalamai left its imprint on it. The Hindu Law, the Mohammedan law, the Roman-Dutch Law and even the English Law have in turn made their contributions in developing the Thesawalamai.

Influence of Hindu Law

With the constant immigration of Tamils from the Coromandel coast and with the advent of Aryachakravaty, a number of usages of the Tamils of the Coromandel coast were introduced. Owing to Brahmanical influence, the patriarchal system of society took a firm root among the Tamils of the Coromandel coast. When the Tamils of the Coromandel Coast came over to Jaffna, as the late Mr. V. Coomaraswamy has shown, they found that the people of Jaffna had their distinct usages founded on the matriarchal system of society, and these usages could not be changed in *toto*. A happy compromise was gradually effected; and in the law of Thesawalamai we find a curious blend of principles governing the matriarchal and the patriarchal systems of society existing side by side.

The rule under the earlier law was that females succeeded females. When marriage unions became permanent, and when the structure of society came to be based on the patriarchal system, the corresponding rule was recognised, that males succeeded males. Thus, we see that the devolution of *muthusam* (paternal inheritance) was on the sons, and the devolution of the dowry (*chidenam*) was on the females. Just as one dowried sister succeeded to another, we have the corresponding rule that if one's brother died intestate, his properties devolved upon his brothers to the exclusion of his sisters; the reason being that in a patriarchal family each brother formed a family unit, but all the brothers being agnates, when one of them died his property devolved upon his agnates, his only relations.

With the firm establishment of the patriarchal system of society we find the adoption of some of the principles of the Hindu joint family system.

1. Allen, p. 51. (2nd Edition)

Thus, the rule in Thesawalamai that "so long as the parents live, the sons may not claim anything whatsoever; on the contrary, they are bound to bring into the common estate (and there to let remain) all that they have gained or earned, during the whole time of their bachelorship excepting wrought gold and silver ornaments for their ladies, which have been worn by them and which have been either acquired by themselves or given to them by their parents, and that until the parents die, even if the sons have married and quitted the paternal roof," is taken from the Hindu law and expresses one of the fundamental rules of the Hindu joint family system.¹ The rule that if age renders the parents incapable of administering their acquired property the sons divide the same, is an incident of the joint family system.² In such a case it is the duty of the sons to support their parents; and if the sons do not support the parents the parents can resume control of the property. These principles were taken over from the Hindu Law.³ The hard measure that sons are bound to pay their father's debts is taken from the Hindu Law.

The rule that after the father's death the mother is recognised as the head of the family till she marries again, when she passes into the agnatic family of their second husband, is traceable to the principles of Hindu Law. The rule that "if a husband and wife have no children and are therefore desirous to give away some of their goods to their nephews and nieces or others, it cannot be done without the consent of the mutual relations," is referable to the fact that in a Hindu joint family the property belongs to the family, and hence the consent of the members must be obtained for the alienation of the property.⁴ Thus we see the patriarchal system gradually displacing the matriarchal family and principles of the Hindu Law were gradually introduced to suit the changing conditions prevailing in Jaffna.

Many other principles of Hindu Law can be recognised. Thus, the provision that if a pawnee used the goods pawned, then he forfeits his interest, is taken from Hindu Law.⁵ The provision that "If two persons jointly borrow a sum of money from another and bind themselves generally, then the lender can demand the money from the person he meets first," is a provision of Hindu law applicable to joint and several bonds.

Not only did the people from the Coromandel coast bring the Hindu

1. Colebrooke, Hindu Law, Vol. III, p. 27.
2. Colebrooke, Hindu Law, Vol. III, pp. 23-24.
3. Colebrooke, Hindu Law, Vol. III, pp. 38-39
4. Colebrooke, Hindu Law, Vol. II, p. 246.
5. Colebrook Vol. I, p.

Law with them, but during the time of the Aryachakravaty the Hindu law was administered in the case of a *casus omissus* as it was a mature and well-developed form of law. This appears to be so from the Report of Sir Alexander Johnstone who said that the people of Jaffna were governed by their customary laws, and, in the case of a *casus omissus*, by the Hindu Law.¹

The Influence of Mohammedan Law

The invasion of the Moguls brought about many changes in the customary usages and laws of the Indian people. The influence of Mohammedan law on the Law of Thesawalamai is felt in the law of pre-emption. Tyabji, J., in delivering the opinion of the Privy Council in an Indian case² said, "Pre-emption in village communities in India had its origin in the Mohammedan Law (as to pre-emption) and was apparently unknown in India before the time of the Mogul rules." The law of pre-emption in Marumakattayam Law and in Thesawalamai is derived from the Mohammedan Law. We have seen earlier that during the time of St. Sundarar the law of pre-emption was known to the Tamils. St. Sundarar lived in the tenth century, long after the Mogul invasion and hence it is not surprising that pre-emption was a recognised legal institution during his time.

Mr. Balasingham has ventured to express the opinion that pre-emption was brought by the Mohammedans to Jaffna.³ But there is no justification for this theory. The customary laws of Mohammedans of Ceylon were codified in 1806 and there is no mention of the law of pre-emption in the Code. If pre-emption was brought by the Mohammedans there is no reason why it was not mentioned in the Mohammedan Code. It is more correct to say that pre-emption was brought by the Malabar immigrants.⁴

The Effect of Portuguese and Dutch Rules on Thesawalamai

The only reference to the law of Thesawalamai during the Portuguese period is contained in De Queyroz's work entitled "Conquest of Ceylon". He says,⁵ "It is the custom in that Kingdom that the ascendants cannot inherit, and of the descendants, only the male children; and if they are emancipated,

1. See past page 32.
2. 13 Ali L.J. 236.
3. See Balasingham 'Law of Persons,' Vol. I, p. 165.
4. See Balasingham 'Law of Persons,' Vol. I, p.167.
5. De Queyroz, "The Conquest of Ceylon" (translated by Father S.G.Perera) Vol. I, p. 53.

they are admitted to the partition of the household goods during the Father's lifetime, and by the Mother's death to the part of the heritage, but not to the *castrenses* property acquired by war service or *quasi-castrenses*. If there are no sons the heritage devolves on the Brother, for they cannot adopt a stranger unless it be a nephew, son of a Brother, and if of a Sister, it will be with the consent of one to whom the heritage is due, or if he is a Belala or a Paradeze, to obtain the heritage." In this account, De Queyroz sets out some of the fundamental rules of Thesawalamai, but it is neither an exhaustive nor an accurate description of the Law of Thesawalamai as it existed during the Portuguese period.

The Portuguese appear to have effected various changes in the law of Thesawalamai. This is apparent from a passage in the Thesawalamai Code which reads as follows :- "But in process of time, and in consequence of several changes of Government, particularly those in the times of the Portuguese (when the Government was placed by the order of the King of Portugal in the hands of Don Philip Mascarenga) several alterations were gradually made in the customs and usages according to the testimony of the modliars". Thus the rule that dowry can given out of *muthusam*, *chidenam* or acquired property, had its origin in Portuguese times.

The Dutch appear to have changed the Thesawalamai by express legislation and by the adoption of the Roman-Dutch Law. A passage in the Thesawalamai Code supports this view. It says :- "And the experience of many years has taught us that such parents (in order to revenge themselves on their sons) endeavour by unfair means to mortgage their property for the benefit of their married daughters or their children; and for this reason it has been provided by the Commandeur that such parent may not dispose of their property either by sale of mortgage without the special consent of the Commandeur, which is now become a law."

The provisions contained in paragraphs 1,17 and 18 of the Thesawalamai Code dealing with pagans, are the outcome of legislation by the Dutch whose intention was to make the Thesawalamai applicable only to Christian subjects. In dealing with the law of pre-emption, in the Thesawalamai Code there is further evidence of Dutch interference as could be seen from the following passage in the Thesawalamai Code stating the law of pre-emption. Class Isaakz says : "Yet this mode of selling lands underwent an alterations afterwards in consequence of the good orders given on

the subject during the time of the old Commander Bloom (of blessed memory), as since those orders no sale of lands whatever has taken place until the intentions of such a wish to sell the same have been published on three successive Sundays at the Church." The Dutch legislated on various matters. They passed what is popularly known as the 76 order which dealt with various matters.¹ The original records in the Government Archives show that the manuscript containing these orders was signed on the 25th April, 1804, by C. T. Simons. The preamble says that these orders were necessary to settle many points in dispute in matters affecting sales, *otti*, money, herding, marriages, dowries, etc.² The preamble proceeds to state that these orders are framed in accordance with the Customs of the Tamils.³

The Influence of Roman-Dutch Law

The Dutch administered the Roman-Dutch Law on matters not covered by Thesawalamai. Paviljoen, who was the Commandeur of Jaffnapatam, in his instructions to his successor wrote in 1665 as follows: "The natives are governed according to the customs of the country if these are clear and reasonable; otherwise according to our laws."

In the case of *Iya Mattayer v Kanapahipillai*,⁴ Dalton, J., says: "Having regard to the auspices under which the collection of laws and customs of Jaffna was composed, and by whom it was composed, it is difficult to think that the provisions of Roman-Dutch Law did not exercise some influence, and that the idea of a partial community of goods as in the case of *thediathettam* may not have been strengthened by, if not derived from, the Common Law of the Dutch Government." The Roman-Dutch Law being the Common Law of the land, it appears to have been invoked whenever the provisions of the Thesawalamai were silent and hence its influence is greater after the codification of the Thesawalamai.

However, when one considers the Thesawalamai Code itself, the influence of Roman-Dutch Law is felt, though it is not appreciable. The provision that if the husband's property or the wife's property is

1. For a fuller discussion regarding the 76 orders -- see Dr. Reehlege's *Chredeniz Der Campaignen* by J. Von Kan Tweedle Bundle.

2. M.686.

3. (1928) 29 N.L.R. 301 at p.307.

4. Van Leeuwen, Bk. IV, Ch.24, S.13.

improved, then the husband's heirs or the wife's heirs shall not be at liberty to claim compensation from the estate of the wife or the husband as the case may be, is taken from the Roman-Dutch Law. Van Leeuwen says,¹ "If the wife gets her dowry which she contracted to have free, with or without fruits so as they were found in existence, and no changes incurred by the survivor during the marriage are allowed to be discounted even if it was for the amelioration of the property or for the recovery of the fruits." Thus we see that if the wife's property was improved then nothing could be claimed by the heirs of the husband on that account. This principle was extended to the case where the husband's hereditary property was improved. The rule of Thesawalamai that though gifts between husband and wife were regarded as null and void, yet if the husband had given something to the wife or the wife to the husband, and the gifts had not been revoked, then such gifts were in the nature of donation *mortis causa* and hence were valid, is traceable to the Roman-Dutch Law.² The rule that in the case of trees which grow by themselves, the fruit belongs to the person whose grounds they overshadow, has a parallel in Roman-Dutch Law.³ As stated previously the greatest influence of Roman Dutch Law is felt after the codification. The decisions of our courts reflect this view.

The Influence of English Law

The influence of English Law on Thesawalamai is noticeable though not considerable. The principles of English Law have been introduced either by tacit acceptance of English principles or by legislation based on English Law. Our Judges, trained in the English system, have often referred to English Law in solving many problems in the law of Thesawalamai. Thus in *Seelachchy v Visuvanathan Cetty*³, Betram, C.J. took the view that the interest a man had in the thediathettam property acquired by his wife was in the nature of an equitable estate; and that a *bona fide* purchaser for value from the husband gets a good title. He came to this conclusion by considering principles of English equity. After stating these equitable principles he says,⁴ "As I have said, these principles, *mutatis mutandis*, are capable of application to the conditions of this colony and to the circumstances of the present case". Some of the provisions of the Matrimonial Rights and Inheritance Or-

1. Van Leeuwen, 4.24

2. Groitus, 2.24.21:Hebbert Translation, p.209

3. 23 N.L.R. 97 at p.116

4. 23 N.L.R. 117

dinance (Jaffna) are chiefly taken from the Matrimonial Inheritance Ordinance of 1873 which itself is based on principles of English Law.

Summary

Thus, we see that the law of Thesawalamai is mainly composed of the usages of the Tamils when they were in a matriarchal stage of society, but it has undergone a metamorphosis with the advent of ideas peculiar to a patriarchal society. The law of Thesawalamai as it comes to us has been mutilated and altered by the Dutch and the Portuguese. We have also seen how various positive systems of law like the Hindu Law, the Mohammedan Law, the Roman-Dutch Law and the English Law have influenced the law of Thesawalamai.

CHAPTER II

HISTORY OF CODIFICATION

In the last chapter an attempt was made to trace the genesis of the law of Thesawalamai. We shall now proceed to deal with the history of its codification. The Portuguese did not codify the law of Thesawalamai but presumably applied it as they found it. It is to the enterprise of the Dutch that we are indebted for the existence of the Thesawalamai Code.

DUTCH PERIOD

The earliest reference to the law of Thesawalamai is contained in the instructions of Paviljoen to his successor in 1663. The reasons that led to the codification of the Thesawalamai are stated in the Memoirs of Hendri Zwaardcroon., Commander of Jaffnapatam and afterwards Governor-General of the Council of Netherlands India, written for the guidance of the Council of Jaffnapatam during his absence from Ceylon. Commenting on the customary usages prevalent in Jaffna, he says¹ :- "I also found that no law books are kept at the Courts and it would be well, therefore, if Your Honours applied to His Excellency the Governor and the Council to provide you with such books as they deem most useful, because only a minority of the members possess these books privately, and, as a rule, the Company's Servants are poor lawyers. Justice may therefore be either too severely or too leniently administered. There are many native customs according to which civil matters have to be settled, as the inhabitants would consider themselves wronged if the European laws be applied to them, and it would be the cause of disturbances in the country".

1. Memories of Hendrie Zwaardcroon, Translation by Sophia Pieters, pp.49-50 - published by the Government Printer, Ceylon.

"As, however, a knowledge of these matters cannot be obtained without careful study and experience which everyone will not take the trouble to acquire, it would be well if a concise digest be compiled according to the information supplied by the chiefs and most impartial slaves. No one could have a better opportunity to do this than the Dissawe, and such a work might serve as for the instruction of the members of the Court of Justice as well as for new rulers arriving here, for no one is born with this knowledge. I am surprised that no one has yet undertaken this work."

The Dutch Government appears to have acted on the suggestions of Zwaardcroon by taking immediate steps to codify the law of Thesawalamai. Thereafter, on the orders of Governor Simons, the Thesawalamai was codified by Claas Isaaksz, the Dissawe of Jaffnapatam. After the task was completed, in a letter dated the 30th January, 1707, Claas Isaaksz says "The above laws and customs of Jaffnapatam were composed by me in consequence of my experience obtained by my long residence and intercourse at that place. I have written the above laws and customs after a strict inquiry into the same, by order of His Excellency the Governor and Doctor of Laws Cornelis Joan Simons; and I hope my endeavours will satisfy His Excellency the Governor's intention."

At the request of Claas Isaaksz, the Thesawalamai Code, which was in the Dutch language, was translated into Tamil by Jan Pirus.¹ In a letter dated 5th April, 1707, addressed to Commandeur Adam Van Der Duyn, Claas Isaaksz says² :- "You are not ignorant that I have composed the Malabar laws and customs by order of His Excellency the Governor, which I have done so far as my knowledge of the same permitted me: yet to prevent any future dispute concerning the same, I request that you will have the goodness to cause them to be translated into Malabar by the translator Jan Pirus, who is known to have a through knowledge of that language. And I also request that you will cause the translation to be distributed among the Malabar Mudaliyars, in order that they may state their objections, in writing, to my composition, should they have any; in which case I request that you will appoint such persons as would be able to point out to you such mistakes as might have been committed either by me or by the said twelve Mudaliyars; and should such persons as are appointed by you decide in my favour, I re-

1. See Article by Vetus on "The Thesawalamai and Mohamedan Code," 4 Law Recorder IV.

2. Legislative Enactments, 1707 to 1879, Vol. I, p.28

quest that you will desire them to sign the Malabar translation. I insist upon this mode of giving their assent to my composition..."

On receipt of this letter Commandeur Van Der Duyn caused the Code to be translated into Tamil and distributed it to 12 Mudaliyars whom he selected and who gave their approval of it. In a letter addressed to the Governor, Van Der Duyn says,¹ "Pursuant to the application made to me by the Dissawe, Mr. Claas Isaaksz, I have caused the composition of the Malabar laws and customs in use at this place to be translated, and afterwards delivered the translation thereof to twelve sensible Mudaliyars, whose names are hereunder specified, in order to peruse and revise the same. They have been employed in that work a great length of time and have now returned the same to me with the following observations, viz. "We the undersigned twelve Mutaliyars, have received from the Commandeur the Malabar laws and customs composed by the Dessave, Mr. Claas Isaaksz, in order to be perused and revised by us, and afterwards to state our opinion whether or not the same agrees with such laws and customs as are in use at this place."

'We were also desired to confirm the translation of Malabar Laws and Customs with our signatures, should we agree to the corrections of the same.'

"We declare by these presents, that the composition of the said Malabar Laws and Customs perfectly agrees with the usual customs prevailing at this place and we therefore fully confirm the same. But we deem it our duty to state hereby that, according to the ancient customs which prevailed under the Portuguese Government, and also at the commencement of the Dutch Government, in case slaves happened to behave themselves disrespectfully to their masters, and disobey any of their orders, such masters had a right to give them correction, and by that means to make them mind their duties. But within the last eight or ten years it very often happens that as soon as masters punish their slaves for any faults, such slaves maliciously tear their own ears and anoint their body in order that they may have a pretence to complain of their master's ill-treatment, the consequence whereof is that such slaves obtain some *lascooreens* from the magistrate in order to bring their masters before the same. Such occurrences cannot but injure the character of the masters, and at the same time render the slave audacious."

1 Legislative Enactments, 1707-1879, Vol. I, p.29.

We must also observe that when any slaves are conveyed to the fort to be put in chains for their misbehaviour, the proprietors are obliged to pay great expenses, and are unable to defray the same when they are in indigent circumstances, on which account the slaves very often disobey and vex their indigent masters."

"We, the conjunct Mutaliyars, therefore request that it may please His Excellency the Governor to order that the payment of twenty-four stivers, which is at present received on such occasion from their masters, may be diminished."

"We Don Philip are the persons who have perused and revised the translation of the Malabar Laws and Customs, in consequence whereof we confirm the same with our signatures."

They also asked to have the emancipated male and female slaves reduced again to slavery according to heathen custom in case they behaved themselves disrespectfully to their former masters. The matter came up before Cornelis Joan Simons, Doctor of Laws, Governor of Ceylon, who confirmed the Code of Laws but refused to grant the request of the Mudaliyars.¹

The translation of Jan Pirus, as approved by the Mudaliyars, was approved for official use. This appears from a letter dated 16th December, 1707, written by Governor Simons in Council to the Coomandeur of Jaffnapatam, which reads as follows:²

"The Malabar Laws and Customs composed by the Dessave Claas Isaaksz are approved of by Us, and in consequence thereof We desire that authenticated copies of the same should be sent to the Court of justice and the Civil Landraad for their guidance. And We also desire that the said Laws and Customs should be entered in the records at the office of the Secretary to Government...."

The letter concludes by refusing the request of the Mudaliyars to reduce the expenses incurred in incarcerating the slaves. The reasons given are that the masters would in that case have recourse too often to that punishment on account of its cheapness. Thus, we see that this great tax-gathering

1. Recorder IV, Article by Vetus on the Thesawalamai and Mohamedan Code.

2. Legislative Enactments, 1707 to 1879, Vol. I, p. 30.

empire refused their request not on humanitarian grounds but with the view to increasing their revenue.

From the year 1707 to the year 1799, the year on which the Maritime Provinces were ceded to the British Government, the Thesawalamai Code appears to have been applied in civil disputes. There are only a few decisions of the Dutch Courts in the Government Archives interpreting the law of Thesawalamai.

British Period

When Ceylon was ceded to the British by the Dutch, by Proclamation of 23rd September, 1799, it was stated that "the administration of Justice and the Police in the settlements of the Island then in His Majesty's dominion and in the territories and dependencies thereof will be henceforth and during His Majesty's pleasure be exercised by all Courts of Judicature, civil and criminal, magistrates and ministerial advisers according to the laws and institutions that subsisted under the ancient government of the United Provinces, subject to such deviations and alterations as the Governor should by the said proclamation or by any future proclamation and in pursuance of the authorities confided to him deem it proper and beneficial for purposes of justice to ordain and publish or which should or might be thereafter by lawful authority ordained and published." Since this Proclamation the laws that existed under the ancient Government of the United Provinces were administered in the Maritime Provinces of Ceylon as laws made and promulgated by the Crown. By Regulation dated 9th December, 1806, it was enacted that the "Thesawalamai or Customs of the Malabar inhabitants of the Province of Jaffna as collected by the order of Governor Simons should be considered to be in full force" (Clause 6). It is also stated that "All questions between Malabar inhabitants should be decided according to the said Customs".

Immediately after the British occupation the Thesawalamai Code was translated into English but it was not well done. Sir Alexander Johnstone, the then Chief Justice, prepared a fresh translation correcting only, as he termed it, 'the rude English' of the Ceylonese (Dutch) translator. He introduced marginal notes of the text for greater convenience. In a report of His Majesty's Government he says:¹ "No people can be more attached to their ancient institutions than the inhabitants of the Province of Jaffna; and nothing is more calculated to secure their respect for the administration of Justice than the

¹. The Handbook of Thesawalamai by Katiresu, pp.1-4

strict adherence on the part of the Courts (whenever circumstances shall permit) to those customs, which the experience of ages has shown to be applicable to their station and which have therefore obtained among them all the force and authority of law."

"The inhabitants of that Province consisted of two descriptions of people differing from each other in their origin, religion and laws. The one, the Tamil or 'Malabar' inhabitants whose names, features, manners and language as well as the historical fragments and popular traditions met with at Jaffna and at Madura, distinctly prove them to be descended from that ancient people who inhabited Tellingga, the Southern Provinces of India, before they were subjected to the Tellingga Empire of Vijayanugger. The other are the Lebbes or Mohammedan inhabitants who are descended from the Arabs of the house of Hashim, who were driven from Arabia in the early part of the eighth century by the tyranny of the Caliph Abu 'Al Melekibnu Nuiran and who proceeding from the Euphrates southwards, settled among the coasts of Ceylon as well as along those of the peninsula of India."

"The Tamils-some of whom are Christians but most of them are worshippers of Vishnu or Siva- (independently of Dharma Shastra, the source of all Hindu Law, the Viguyan Ishuar, a law tract of great authority in the south of India and Videyanugger's Commentary on the text of Parasara, a work of equal authority in the Mysore country) have a customary code of their own called the Thesawalamai which, though it provides for many cases, leaves others to be decided according to the general principles of Hindu Law, as evidenced in the works to which I have just alluded."

"We are much indebted to the late Dutch Government for having collected and reduced to writing the various customs of which the above customary code is composed. With respect to this code, the late Dutch Governor Simons, very early in the last century, finding that such customs existed in the Province of Jaffna, and that great injustice was suffered by the people in consequence of no written collection of them ever having been made, ordered such a collection to be immediately prepared. This was accordingly done in the year 1707, from the reports of those natives in the Province of Jaffna who were known to be most conversant with the subject, and who, by affixing their names to the compilation, as a proof that they would vouch for its authority, gave it all possible weight with the inhabitants of the country.

"This collection supplied the rules according to which several Dutch Courts framed their decisions, from the year 1707 to the period when Jaffna was surrendered, to the British arms. From the latter period to the year 1806, although it was sometimes referred to, yet from its being in Dutch its contents were by no means so well-known as they ought to have been; and in 1806, while I was on my circuit through the Province of Jaffna, aware of the great veneration which the people entertained in this collection, I, with the approbation of the Government, caused the whole of it to be translated into English, and printed. As, however, I had not the opportunity at that time of comparing that translation with the original, and as I have since thought that it may be much improved in point of arrangement, I took the opportunity of my late circuit to consult with many individuals, in the Province, as to the alterations which it would be advisable to adopt, and shall at an early period take the liberty of submitting to the Government what I have to suggest on the occasion."

After Sir Alexander Johnstone had made this report, having obtained the opinions of the best informed Tamils, he caused copies of the collection by Claas Isaaksz to be printed in English and sent them to all the courts and Magistrates. He further caused numerous copies to be printed in the Tamil language on palmyrah leaves and circulated them among the heads of the villages with a direction to them that they should explain the Codes to the people of their respective villages.¹ From this time the law of Thesawalamai appears in the Statute book.

From the year 1806 the English translation prepared at the instance of Sir Alexander Johnstone has been regarded as statute law. All doubts are removed by the Interpretation Ordinance which states that legislative enactment will be interpreted to include the Thesawalamai Code.² After the cession by the Dutch to the British, the Courts in Ceylon are governed by this Code.

Muttukrishna has with great energy and labour gone through the old records and collected the various decisions of the British Courts in a work entitled "A New Edition of Thesawalamai or the Laws and Customs of Jaffna together with the decisions of the various Courts." This collection helps

1. See appendix to the Ceylon Edition of Van Leeuwen.
2. Cap. 2 of the Legislative Enactments.

the student to understand the various principles of the Thesawalamai as set out in the Code of Claas Isaaksz. It also contains various customary usages that are not incorporated in the Thesawalamai Code. It is often referred to in deciding matters governed by the Thesawalamai. But many of the decisions reported are judgments of the lower Courts and hence have no binding effect.

Ever since law-reporting began to be done on a systematic basis, there have been many decisions relating to the Thesawalamai which are contained in our Law Reports. Few statutory changes have occurred. Special mention must be made of Ordinance 49 of 1885 and the Matrimonial Rights and Inheritance Ordinance (Jaffna) which was enacted in the year 1911. It is stated that the latter Ordinance should apply to those Tamils to whom the Thesawalamai applies; it is also provided that so much of the Provisions of the collection of customary law known as the Thesawalamai and so much of the provisions of section 8 of the Wills Ordinance, as are inconsistent with the provisions of this Ordinance are hereby repealed.¹ Recently legislation has been introduced affecting the law of Thesawalamai.²

1. See section 40, Matrimonial Rights and Inheritance (Jaffna) Ordinance, Cap. 48.
2. See Ordinance Nos. 69 and 70 of 1947.

SOURCES OF THESAWALAMAI

CHAPTER III

THE SOURCES OF THESAWALAMAI

MEANING OF THE TERM "SOURCE OF LAW"

The term "Source of Law" has different meanings in Jurisprudence. According to Austin, the term "Source of Law" means the immediate author, namely, the Sovereign from whom all law emanates.¹ In another accepted sense he says that the term "Source of Law" means the original or early extant documents by which the existence of law is known. In this sense the work of the Glossators may be said to be a source of Roman Law. According to Holland, the term source of law may have the following meanings:

- (a) the quarter whence we obtain our knowledge of Law, e.g., Statute books, Law Reports, treatises, etc.;
- (b) the ultimate authority which gives them the force of law, namely, the State;
- (c) the causes which have brought into existence rules which have subsequently acquired the force of law. He mentions three such sources of law:- Custom, Religion and scientific discussion;
- (d) The organs through which the State grants legal recognition to rules previously unauthoritative or the organs which create new law such as adjudication, equity and legislation in England.² The term "Source of Law" has therefore many uses and its use is a frequent cause of error unless we scrutinise carefully the particular meaning given to it."³

In dealing with the sources of the Thesawalamai, we shall adopt the meaning given to the term "Source" by Holland, viz, the quarter from which we obtain our knowledge.

1. See Austin's Jurisprudence S.E., p.284.

2. Holland, Ch.5.

3. Text Book of Jurisprudence by G.N. Paton (Oxford Press, 1946).

The pertinent question may be asked 'where is the law of Thesawalamai to be found'? Is it contained in the Thesawalamai Code collected by Claas Isaakz and translated by Sir Alexander Johnstone, or in Ordinances effecting the Law of Thesawalamai, or in the ruling of our Courts interpreting the law of Thesawalamai or in the customary laws of the country? Generally speaking, it may be said that the law of Thesawalamai is to be found in all these sources. Regulation 18 of 1806, states that the "customs of the Malabar inhabitants of the Province of Jaffna as collected by the order of Governor Simons in 1706 shall be in force". This collection, it may be remembered, is in the Dutch language.¹ Hence, if there is any discrepancy between the Dutch version of the Code and the English translation, on principle it is the former that should be looked into. In the case of *Sabapathy v. Sivapragasam* (1905 - 8 N.L.R. 62) the Supreme Court took the view that it is the authorised English translation, that is authoritative and not the Dutch original. In this case the question that had to be decided was whether an adjacent landowner could claim rights of pre-emption over his neighbour's land. According to Section 7 (1) of the English text of the Thesawalamai Regulation, in order to entitle an adjacent landowner to his right of pre-emption, it is necessary that he should also be a mortgagee of the land in respect of which the right is claimed. A reference to the Dutch original or to the Tamil translation will clearly show that this is altogether a wrong translation. In the Dutch original, the right of pre-emption is given to neighbours or *otti* mortgagees. It does not state that only a neighbours who has a mortgage over the property is entitled to this right. Yet the Supreme Court followed the English text in preference to the Dutch original and the Tamil translation. Moncrieff, J., in delivering judgment said²: "Ceylon Courts have naturally used the English translation for nearly a century, although the original text is in the Dutch language. That which we now use is printed in a volume issued 'by the authority of the Government Printer', and I imagine we are to take it to be a correct translation until those who authorised it think fit to alter it. I do not think it was left to our discretion to alter the translation even after having recourse to the Dutch original and the opinion of experts."

In this connection one may refer to section 57 of the Evidence Ordinance.

1. A copy of this manuscript is preserved in the Ceylon Archives.

2. 8 N.L.R., p.62 at p.65.

nance which says that the Court shall take judicial notice of all laws or rules having the force of law in force in this Island.¹ There is a presumption also that books of law published under the authority of the Government Printer contain a correct statement of the law of this country.² But this is only a presumption which can be rebutted, and what was promulgated by Regulation 18 of 1806 was not the English translation of the Thesawalamai Code, now contained in Volume 2 of the Legislative Enactments, but the customs of the Malabar inhabitants of the Province of Jaffna as collected by the order of Governor Simons in 1706. This collection is in the Dutch language, and therefore it is submitted that when there is a discrepancy between the Dutch original and the English translation the view stated in the Dutch original must be adopted. No Court of Law is justified in stating that though a substantive provision of the law is existing, yet it cannot be followed merely because Courts have not followed it for a certain length of time, unless it could be stated that it has been abrogated by disuse. After 1938, however, the English translation as edited by Mr. Hema Basnayake is to be regarded as the statute law.

OBSELETE PROVISIONS OF THESAWALAMAI

Provisions obsolete by disuse

It is not possible to state precisely what provisions of the Thesawalamai Code are obsolete. But in answering this difficult question it is best to cite the word of the Commissioners who sat on the Thesawalamai Commission³: They said: "It should be remembered that the Thesawalamai represents a large body of customary law. It is not easy, and it would be extremely unsafe for a Commission to decide whether each and every one of these customs should or would not be regarded as law. In cases where the amendments suggested have clearly and specifically altered the existing law, we are indicating the particular portions of the Thesawalamai Code which necessarily become inoperative by such amendments. It is also possible in certain clear cases to point to particular portions of the Code which have become obsolete and which should no longer be regarded as having the force of law, as for example in the case of adoption, So also in the case of loans of money dealt with in section 9 of the Code, and gifts and donations dealt with in section 4, it is possible to say that these provisions have fallen into disuse,

1. See Section 57, Evidence Ordinance.

2. See Section 84, Evidence Ordinance.

3. Sessional Paper III of 1930, Report of the Thesawalamai Commission, January 30th, pp. 10 and 11.

and the common law is applicable to these subjects. We are agreed, therefore, that the following provisions of the Thesawalamai Code should be repealed:-

Section 2 -In view of our resolution that the law of adoption should be repealed, the whole of the section may be repealed.

Section 4 - The provisions in this section are obsolete. They have been anticipated by Common Law.

Section 7(1) -If our submissions as to the amendments of pre-emption are adopted, the provisions in section 7 (1) may be repealed.

Section 7 (2) -We are of opinion that the provisions of section 7 (2) are obsolete."

The acting Legal Draftsman, Mr. C. C. A. Brito Muthunayagam, in his report commenting on the report of the Commissioners said:-²

"A great part of the Thesawalamai Code has fallen into disuse, and for all practical purpose has ceased to be law. But till now no straightforward attempt has been made to repeal the obsolete provisions and all that has been achieved in this direction is to provide in the case of the Jaffna Matrimonial Rights and Inheritance Ordinance, 1911,¹ that so much of the Thesawalamai as is inconsistent with any particular Ordinance shall be deemed to have been repealed. The Commissioners rightly say 'It should be remembered that the Thesawalamai represents a large body of customary law.' It is not easy and it would be extremely unsafe for a commission to decide whether each and every one of these customs should or should not today be regarded as law; and this apparently is the reason why no attempt was made in 1911 to repeal specific portions of the Thesawalamai Code. This Code itself is in composition so entirely unlike the legislative enactments, that it does not lend itself to treatment in respect of repeals in properly drafted Ordinances. Though there is a rough division of the subject-matter dealt with in the Code, very frequently there is embodied in the provisions dealing with one topic, material that ought properly to find its place under another head. There are portions, however, which are capable of specific repeal without upsetting the balance of the Code. However, considering the manner in which repeals have been effected in the past by the Ordinance of 1895 and 1911, I do not think it will be prudent to embark on a scheme of scientifically pruning the Code so

1 .See Extract from the Report of the Legal Draftsman dated 25th October, 1930, Sessional Paper I of 1933, Supplementary Report of the Thesawalamai Commission, Clause 7.

as to leave in hand so much of the law as is today in force. The Commissioners thus felt that 'it is not easy and it would be extremely unsafe to decide whether each and every one of these customs should not be regarded as law; unless it is possible definitely to decide the matter it should be unsafe to repeal portions of the Code, for by leaving behind something that ought to be banished, a new life would be given to it which it does not possess at present. The existence of obsolete matter in the Thesawalamai does not appear to have caused any difficulty till now, and it would be safe to leave matters stand as they are.'

The Thesawalamai Commission did not entirely agree with this report. They, in their Supplementary Report,¹ said: "In paragraph 7 of his report the Acting Legal Draftsman expressed the opinion that it would be unsafe to repeal specific portions of the Code as that might imply a recognition as operative of that which is not repealed. This is possible and we agree with his suggestion."

While agreeing with the difficulty of scientifically pruning the Thesawalamai Code we do not agree with the Legal Draftsman when he says that the existence of obsolete matter in the Thesawalamai Code does not present any difficulties. One of the main difficulties in understanding the Thesawalamai is the existence of obsolete provisions of this archaic Code collected by Claas Isaaksz in the year 1707. The existence of piece-meal legislation to amend the Thesawalamai Code instead of clarifying the law has made it more obscure.

Unfortunately, the recommendations of the Thesawalamai Commission were not given effect to, and no legislation has been passed repealing these provisions. But this report would indicate what provisions of the law of Thesawalamai are obsolete. As suggested by Dalton, J., in *Kander v. Sinnachippillai*² one should lead evidence to show that some provisions of Thesawalamai have fallen into disuse or that a contrary practice has developed which is in conflict with some provisions of Thesawalamai before a Court of Law could state that a particular provision is obsolete.

In enunciating these principles their Lordships state the cardinal rule

1. See supplementary Report of the Thesawalamai commission, January, 1993, Clause 7.

of Roman Law, as developed by the Continental jurists, that customary usages can over-ride a legislative measure. The Historical School of Jurisprudence took the view that the law is to be found in the consciousness of the people. It regarded customary law with great sanctity and stated that customary law was the only true type of law, and if it is contrary to some provisions of law passed by the legislature, then it must be recognised. Since the Common Law of this country is the Roman-Dutch Law, it is submitted that this doctrine would be equally applicable to Ceylon. It must be remembered that this is contrary to the canons of interpretation under the English Law which state that unless a statute is repealed it is always law.

In 1937, by the Provisions of the Revised Edition of the Legislative Enactments Ordinance, powers were given to a Commissioner to delete, omit or enact any provision in the Statute book. Many obsolete provisions of Thesawalamai were re-enacted¹.

Provisions Obsolete by Tacit Repeal

Certain parts of the Thesawalamai Code have been impliedly repealed by the Jaffna Matrimonial Rights and Inheritance Ordinance.² Section 42 of the Matrimonial Rights and Inheritance (Jaffna) Ordinance states that if any of its provisions are in conflict with the Thesawalamai Code, such provisions of the Code which are in conflict are repealed. In some cases the Supreme Court has stated that the provisions of the Thesawalamai Code have been impliedly repealed by the Matrimonial Rights and Inheritance (Jaffna) Ordinance. Thus, in the case of *Annapillai v. Saravanamuttu*,³ His Lordship Justice de Kretser took the view that the provisions of the Thesawalamai Code which state that if a man marries a second time he should hand over the custody of the child to the grandmother is obsolete. This opinion was merely *obiter*; but in a later case,⁴ His Lordship adopted his former view and actually decided that this provision is obsolete. The whole law of intestate succession as stated under the old Code was repealed by the Matrimonial Rights and Inheritance (Jaffna) Ordinance.

There are various other Ordinances subsequent in date which have impliedly repealed the provisions of the Thesawalamai Code. To give a few

1. See *Fernando v. Rex*, 16 C.L.W.13

2. Cap.48

3. 40 N.L.R.I.

4. *Ambalavanar v. Ponnamar*, 42 N.L.R.289.

examples, section 1 (4) of the Thesawalamai Code states that dowry property may be redeemed even fifty years after mortgage; this is hardly law, particularly if another person claims adversely to the grantee of the dowry, in view of the provision of the Prescription Ordinances.¹ Section 3 (1) of the Thesawalamai Code dealing with the partition of lands held in common has hardly the force of law in view of the provisions of the Partition Ordinance of 1863.² Section 5 (8) of the Code of Pawns must now be read subject to the provisions of the Pawnbrokers Ordinance of 1893.³ The sections of the Code dealing with slavery were repealed by Ordinance No.20 of 1844. Section 9 (2) says that a creditor can proceed against the first debtor he had met in joint and several debts. This is hardly law in view of the provision of section 15 of the Civil Procedure Code⁴ and Bills of Exchange Ordinance⁵, Section 1(8), of the Thesawalamai Code states that the consent of the Commandeur must be had in order that an aged parent may mortgage a land which he has assigned in favour of his sons. This is no longer law since these dignitaries do not exist in modern times. Instances can be multiplied to show that many of the provisions of the Thesawalamai Code have only an archaic interest.

Ever since the Thesawalamai Code became law, our Courts have interpreted its provisions. Therefore, many provisions of the law of Thesawalamai are found in the decisions of the Supreme Court. The only statute which has made substantial changes in the Law of Thesawalamai is the Jaffna Matrimonial Rights and Inheritance Ordinance of 1911⁶ Recent statute law has brought about far-reaching changes in the law of Thesawalamai.⁷

CUSTOM AS A SOURCE OF LAW IN THESAWALAMAI

The Thesawalamai Code is only a collection of those customary usages that came within the experience of Dissawe Claas Isaaksz and the twelve "Modelliars." It is an incomplete attempt to state an important body of customary laws. The supreme Court once stated that it was a collection of single instances. There were a number of customary usages which were not codi-

1. Cap. 55.

3. Cap.75.

5. Cap.68.

7. See Ordinance No.69 and No.70 of 1947.

2. Cap.56

4. Cap.86

6. Cap.48.

have sprung up during the last two centuries. Hence, on principle, evidence of customary usage should be entertained by the Courts in order to supplement the Law of Thesawalamai and for laying down principles contrary to those that are stated in the Thesawalamai Code. The Proclamation of 1799 stated that Ceylon would be governed by the laws and institutions which subsisted under the ancient Government of the United Provinces. Regulation 18 of 1806 merely stated that customary usages collected by the order of Governor Simons should be in full force. It did not state that other customary usages cannot be proved. Custom is a source of law even in countries where jurisprudence has reached a state of maturity and Ceylon is no exception to this rule. Hence, on principle, customary usages must be recognised.

In a number of cases the Supreme Court has allowed customary usages to be established by evidence. In the case of *Vyrewenaden v. Vinasi*¹ the Supreme Court ordered the case to be sent back for further evidence on the case was the custom involving some point regarding acquired property for which there was no provision in the written laws. In the case of *Kander v. Ramasamy*,² the case was actually sent back in order that the opinion of experienced Tamils might be obtained on the question of succession. In this case the Supreme Court rightly held that the Thesawalamai is in fact nothing more than a report of the customs and usages of the country.

This practice, however, had its abuses. Experts would usually be partial towards the side on whose behalf they have been called and hence the Courts were not in a position to find out the true customary law. Consequently, in *Kanapathipillai Theyvar v. Valliammai*,³ the Supreme Court discouraged the practice of sending cases back for the purpose of consulting experts. There are later cases where it was indicated that evidence of customary usages could be led to supplement the Thesawalamai Code. Thus in *Seelachchy v. Visvanathan*,⁴ that eminent Judge, Bertram, C. J., referring to the remedy available to the wife when the husband alienates the whole of his acquired property, says:⁵ "The question, however, has not been fully examined and it appears to me that it might well be left to be further elucidated in some subsequent case by evidence of local custom such as appears to have been frequently adopted in old Thesawalamai cases."

1. *Mutukishna on Thesawalamai*, p.70.

2. *Mutukishna on Thesawalamai*, p.298.

3. 4. Tamb. Reports, p.116

4. 23 N.L.R. 97.

5. 23 N.L.R. 97 at p.111.

THE LAW TO BE APPLIED WHEN THESAWALAMAI IS SILENT

The Thesawalamai is only applicable to a particular locality or to persons who answer to a certain description. If there is a *casus omnisus*, the Roman-Dutch law is often resorted to as the residuary law of the country. But where, although no express provision has been made in the Thesawalamai Code, yet if a Court of law can deduce certain principles of law from the general principles of Thesawalamai, then the Roman-Dutch Law has not been followed. In the case of *Chanmugam v. Kandiah*,¹ a woman who was subject to the Thesawalamai lived in concubinage with two men, (one after the other) and had two daughters, N and M. N. married before 1911 and died intestate. In deciding the mode in which the property of N devolved, the Court party applied the Roman-Dutch Law and partly the general principles of Thesawalamai. In the course of his judgement Schneider, J.,² says: "The principles to be deduced from the following cases-*Puthatamby v. Malivakanam*³; *Teyvar v. Seevagampillai*⁴; *Theagarajah v. Paranthothipillai*⁵; *Kuddiar v. Sinnar*⁶; *Nagaratnam v. Muttutambay*⁷ may be fairly stated to be :-

- (1) That the Roman-Dutch Law, being the law generally applicable to the whole Island, applies where the Thesawalamai is silent;
- (2) That the Roman-Dutch Law does not apply even where the Thesawalamai has no express provision if a question can be decided by general principles deduced from Thesawalamai." Apart, therefore, from the admissions or the agreement of the parties, the law is well settled and clear that it is the Roman-Dutch Law which would apply in the absence in the Thesawalamai of any express provision or of any provision from which a principle could be deduced to decide the contest between these parties.

1 23 N.L.R. p. 221.

2 23 N.L.R. p.223.

3 1897, 3 N.L.R.42.

4 1905, 1. Bal. Rep. 201.

5 1907, 11 N.L.R. 46 : 1908, 11 N.L.R. 345.

6 1914, 17 N.L.R. 243.

7 1915, 18 N.L.R. 257.

The contest in this case comprises two distinct questions:-

- (1) In the law what relationship, if any, exists between the deceased and her mother and her half-sister?
- (2) When that is ascertained, what law of intestate succession applies, the Thesawalamai or the Roman-Dutch law?

As regards the first question, the Thesawalamai altogether silent. It is therefore beyond doubt that for its decision we must resort to Roman-Dutch Law. The principle that 'the mother makes no bastard' is recognised by that system of law. That principle operates to make the second respondent the lawful mother, and the second appellant the lawful sister of the deceased.

The remainder of the contest then resolves itself into the question, given that the deceased left her surviving her mother and her half-sister, who is the heir? According to the cases of the Thesawalamai as expressly provided for this case, or if a "principle for its decision can be drawn from the general provision of the Thesawalamai" the Roman-Dutch Law has no application. The Thesawalamai does contain an express provision. It declares the half-sister the sole heir upon the principle that collaterals exclude ascendants - a principle which is the very antithesis of the principle of Roman-Dutch Law which prefers ascendants to collaterals The aid of the general law is invoked to fill in the omissions of the special law and no more. The only omission in the Thesawalamai in regard to this case is the absence of any principle as regards the relationship of persons born without a lawful father. For the purpose of filling that omission there was justification for resorting to the general law. That resort to the general law had to be made for the purpose is no justification for not applying the express provision of the special law.

Several cases were decided on the general principles of the Thesawalamai, although no specific provision was found in the Thesawalamai Code. Thus, in *Theagarajah v. Paranthotipillai*,¹ the Court had to decide the question whether under the Thesawalamai, property inherited by a child from its mother devolves on the death of the child to the mother's or to the father's next-of-kin. In review, the Divisional Court took the view that a clear principle is deducible from the Thesawalamai that on the death of a father his inherited property returns to his own line, while on the death of the mother, her dowry returns to her line. This general principle was de-

1 1908, 11 N.L.R. 46.

of the mother, her dowry returns to her line. This general principle was deduced from section 1, sub-section 15 of the Thesawalamai Code.¹ In deducing such a principle it must be a corollary of well-recognised principle and not the reverse of it (see *Kuddiar v. Sinnar*²). If there is no express provision in the Thesawalamai Code and if no solution can be effected by considering the general principles of the Thesawalamai and in the absence of custom, Roman-Dutch Law, being the residuary law of the land, is resorted to.

It must be remembered that according to Sir Alexander Johnstone, when he visited Jaffna, the people were governed in the case of a *casus omnisus* by Hindu Law. In accordance with the Proclamation of 1799, it is the Hindu Law that must be applied whenever no provision has been made in the Law of Thesawalamai because that was a system of law that existed during the Government of the United Provinces in Jaffna. But our Courts have taken the view that it is the Roman-Dutch Law that should be applied whenever the Thesawalamai is silent. In *Theyvar v. Seevaganipillai*³ our Courts adopted the Roman-Dutch principles that heirs of the half blood are entitled to share the land with the heirs of full blood. Also, in the case of *Poothathamby v. Mylvaganam*,⁴ it was held that the Thesawalamai only provided for succession among members of the same family, namely, children, parents and brothers and sisters and their children. In all other cases when one has to deal with succession to remoter relations, the Roman-Dutch Law has to be applied. It was held in this case that in the absence of ascendants or descendants, the children of the deceased uncle and aunt took the inheritance per stirpes, this rule of succession being taken from Roman-Dutch Law.

The Jaffna Matrimonial Rights and Inheritance Ordinance now provides for intestate succession. It enacts that if it is silent with regard to any particular point in the devolution of property, the Matrimonial Rights and Inheritance Ordinance of 1876⁵ or the law which applies to the Tamil inhabitants of the Western Province shall apply. The Matrimonial Rights and Inheritance Ordinance of 1876 states that where that Ordinance is silent the rules of the Roman-Dutch Law as it prevailed in North Holland are to be followed.⁶ The Roman-Dutch Law of North Holland was known as

1. See Dictum of Middleton, J., in 11 N.L.R. 346.

2. 1914, 17 N.L.R. 243 at 244 *per de Sampayo, J.*

3. 1 Bal. Repts. 201.

4. 1879, 3 N.L.R., p.42.

5. Cap. 47.

6. Cap. 47. Section 36.

Azingdoms Law, (Azindoms and Recht) as opposed to the South Holland Law (Schependoms and Recht). In 1599 the state of Holland enacted by a placaat of 18th December that the new Azingdoms Law should be applicable in Holland. The placaat after dealing with the mode of succession finally enacts by article 14 that all succession not provided for them were to be governed by principles of Roman Law.¹

1. See Vanderkeesel's Select Thesis, p.359.

CHAPTER IV

THE APPLICABILITY OF THESAWALAMAI

The applicability of Thesawalamai has presented many difficulties to the student of Thesawalamai. It should be borne in mind that the applicability of Thesawalamai deals with two topics, namely, the persons to whom it applies and the subjects to which this particular law is applied to the exclusion of the general law of the land. It is the first topic that has presented many problems, some of which have been solved by the Courts and yet others will have to be settled by the legislature. The Thesawalamai consists of two parts. The first part is a personal law applicable to all persons who answered the description of "Malabar Inhabitants of the Province of Jaffna"; the second part is a local law applicable to all lands situated in the North Province whether owned by a "Malabar Inhabitant of the Province of Jaffna," a Sinhalese, an Englishman or a Chinese.

We shall first consider the question, "to whom does the personal law of Thesawalamai apply?" The preamble to Regulation No.18 of 1806 states :-

"The system anciently pursued with respect to the different description of property which exists in the Province of Jaffna, was the result of much local experience and of a very attentive consideration of those Customs and Religious Institutions which had presented in that Province not only from the time of the Portuguese conquest, but also from the earliest period of the Malabar Government. It assimilated itself to the ancient hatreds of the country, to the feelings and prejudices of the people, and it was for these reasons on the whole, wise in principle and salutary in its effects." Clause 6 of the Regulation states: "The Thesawalamai, or customs of the Malabar Inhabitants of the Province of Jaffna as collected by order of Governor Simons shall be considered to be in full force." Clause 7 states: "All questions between Malabar Inhabitants of the said Province or wherein a Malabar Inhabitant is defendant, shall be decided according to the said Customs Clause 8 States:

"All questions that relate to those Rights and Privileges which subsist in the said Province between the higher castes, particularly the Vellalas on the one hand and the lower castes, particularly the Covias, Nalluas and Palluas on the other, shall be decided according to the said Customs and to ancient usages of the Province.

Thus, the Regulation applied the Thesawalamai to the class of persons who come under the category of "Malabar Inhabitants of the Province of Jaffna." Before we consider the full import of this phrase, we should note that according to the well-known principle of Conflict of Laws, the wife follows the domicile of the husband during coverture and is governed by the system of law applicable to him. Hence, the Thesawalamai also applies to wives who are married to persons governed by Thesawalamai during the subsistence of marriage. It is more convenient to consider this problem first before we attempt to answer the poser "Who are the Malabar Inhabitants of the Province of Jaffna?"

Applicability of the Thesawalamai to spouses married to Malabar Inhabitants of the Province of Jaffna.

In discussing this question, a distinction should be made between marriages which took place before the Jaffna matrimonial Inheritance Ordinance came into operation and those which took place after its operation. In regard to the status of spouses married before its operation, one should refer to section 6 of Ordinance 21 of 1844, which provides that "in all cases of marriage contracted whether within any part of the Colony or abroad without a nuptial contract or a settlement the respective rights and powers of parties during the subsistence of the marriage in and about the management, control, disposition or alienation of any immovable property situated in any part of this Colony which belongs to either party at the time of the marriage or has been acquired during the coverture and also the respective rights in or to such property or any portion thereof, or estate or interest therein, either during a subsistence of the marriage or upon the dissolution thereof, shall in all cases be determined according to the law of Matrimonial Domicile." This section was repealed in so far as it was inconsistent with the Matrimonial Rights and Inheritance Ordinance,¹ but since it is stated that the latter Ordinance does not apply to those subject to Thesawalamai, the provisions of section 6 of Ordinance 21 of 1844, continued to apply to such persons. A

1. Cap. 47.

discussion of case law on this point would indicate that our Courts laid down certain rules.

In *Fernando v. Proctor*¹ the question whether the wife took the matrimonial domicile of the husband was raised but was not decided. The point in issue in this case was whether the wife of one Jolly Phillips was governed by the Thesawalamai. It was proved that she descended from Jaffna Tamils and that she was born at Puttalam, but lived and died at Chilaw. It was also proved that she never went to Jaffna. On the facts of this case the Supreme Court took the view that she herself could not be called a "Malabar Inhabitant of the Province of Jaffna within the meaning of Regulation 18 of 1806. It was further contended that although she was not a Malabar Inhabitant of Jaffna yet on her marriage to Jolly Phillips, who was a Malabar Inhabitant of the Province of Jaffna, she, too, acquired the domicile of her husband by virtue of the provisions of section 2 of Ordinance No.15 of 1876.

The Supreme Court took the view that since both spouses were Tamils, they could not be said to be of different nationalities and consequently section 2 of Ordinance No.15 of 1876 had no application. Wood Renton, J., added - "It may be that apart from Ordinance No.15 of 1876 the matrimonial domicile of the spouses would, in such a case, be that of the husband. But I express no opinion on the point now; for the evidence here does not show that Jolly Phillips himself, any more than his wife, was an inhabitant of the Northern Province."² It is clear that in this case the Court held that Jolly Phillips himself was not a "Malabar Inhabitant of the Province of Jaffna." Hence, this case is no authority for the proposition that if a Tamil woman married a Tamil man who is an inhabitant of Jaffna she does not herself become an inhabitant of Jaffna. The statement in the head note is erroneous.

The case of *Veluppillai v. Sivagamipillai*³ is more in point. In this case a Jaffna Tamil went over to Batticaloa and resided there for thirty-five years and died in 1907. After acquiring a large number of properties at Batticaloa, in 1891 he married in Jaffna, a native of Jaffna, during which period he left his family in Jaffna and visited them periodically. In 1910, he removed his family to Batticaloa and lived there till his death. The question that arose for determination was whether the matrimonial rights of parties

were governed by the Thesawalamai or the Roman-Dutch Law. The Court held on the facts of the case that both the husband and wife were "Malabar Inhabitants of the Province of Jaffna." It was further held that the matrimonial rights of parties were governed by the Thesawalamai, the law of matrimonial domicile. Middleton, J., in delivering judgment said (at page 76): "The important part of our decision in this case is the application of what is said to be the law of Thesawalamai relating to the circumstances of the widow in this case....

That sub-section is repealed in so far as it is inconsistent with Ordinance No.15 of 1876, but in my opinion in respect to Jaffna Tamils it would not be repealed, and the rights of the parties where there has been no previous settlement must be determined by the law of matrimonial domicile. That law, in my opinion, was the law of the Thesawalamai and it will be in consideration of the finding of this Court on that point that the District Judge will in future determine the rights of all parties." Applying the principle stated in this case, if a woman who is subject to Thesawalamai marries a man to whom Thesawalamai does not apply, she will not be governed by Thesawalamai during the subsistence of the marriage.

In considering the law applicable to spouses married after the Jaffna Matrimonial Rights and Inheritance Ordinance,¹ came into operation, specific provision is made on this matter. Section 3 of this Ordinance as amended by Ordinance 57 of 1947 states:-

- (1) "Whenever a woman to whom the Thesawalamai applies *and it shall apply in respect of their movable and immovable property wherever situated*, marries a man to whom the Thesawalamai does not apply, she shall not during the subsistence of the marriage be subject to the Thesawalamai;
- (2) Whenever a woman to whom the Thesawalamai applies marries a man to whom Thesawalamai does not apply, she shall not during the subsistence of the marriage be subject to Thesawalamai." It must be noted that the words in italics were added by Ordinance No.57 of 1947. This section requires further analysis.

1. 1909, 12 N.L.R. 309

2. 1909, 12 N.L.R. at 312.

3. 1910, 13 N.L.R. 74.

1. Cap. 48.

Mr. Kantawala, referring to the provisions of Ordinance No.1 of 1911 says¹: "It follows, therefore, that the system of laws is applicable to the Tamil inhabitants of the Jaffna Province and also to those outside women who marry such Tamil inhabitants." It is apparent to any casual reader that this statement is not based on a correct analysis of section 3 of the Jaffna Matrimonial Rights and Inheritance Ordinance. The section contemplates three classes of persons to whom the Thesawalamai applies. They are:-

- (1) Men who come under the description of "Malabar Inhabitants of the Province of Jaffna."
- (2) Women not under coverture who come within the description "Malabar Inhabitants of the Province of Jaffna."
- (3) Women who are not Malabar Inhabitants of the Province of Jaffna but who marry persons who answer such description, during the subsistence of their marriage.

The words in italics introduced by Ordinance 57 of 1947 settles the doubt expressed in cases as to whether the Thesawalamai applies to immovable property owned outside the Northern Province of Ceylon by Tamils governed by this particular system of Law.²

MEANING OF THE TERM "MALABAR INHABITANT OF THE PROVINCE OF JAFFNA"

We have seen that Regulation No.18 of 1806 states that Thesawalamai applies to Malabar Inhabitants of the Province of Jaffna. What is the exact meaning of this enigmatic phrase? In considering this question, it must be remembered that neither regulation 18 of 1806, nor the provisions of the Jaffna Matrimonial Rights and Inheritance Ordinance define this phrase. The analysis of this phrase leads us to the conclusion that a person governed by Thesawalamai must be a "Malabar." He must be an inhabitant of a particular locality. Such locality must be the "Province of Jaffna."

Meaning of word "Malabar"

It will be pertinent to consider the meaning attached to the term "Malabar" by the Dutch writers. The word "Malabar" is now applied to

1. Thesis on Thesawalamai by Kantawala, p.7.

2. See Post, pp.70-74.

that region which now roughly corresponds to the State of Travancore in Western India. The question arises whether when Claas Isaaksz codified the law of Thesawalamai and called it the Laws and Customs of the Malabars, he restricted its application only to the inhabitants of Jaffna who came from Malabar or to all Tamils having a Jaffna inhabitancy. Some writers have taken the view that many Europeans, including the Dutch and Portuguese, used the word 'Malabar' as synonymous with Tamil.¹ This is the view expressed by the late Sir Ponnambalam Ramanathan. He says:- "Malabar is a corruption of 'Malaivaram' (mountain side), the country lying in the Western Ghats of India. When the Dutch, who had visited Western India, arrived in Ceylon and found the Tamils here to be similar in religion to the Hindus of the Malabar Coast of India, they called these Tamils Malabar Inhabitants, meaning settlers from the Malabar Coast. But the Tamils of Ceylon came from the Eastern Coast (called by the Dutch the Coromandel Coast) and are different from the people of Malaivaram of Malayalam in point of language and social institutions. Hence, it is an error to speak of the Tamils as Malabars.² But it must be remembered that the Malabars as such were not regarded as a distinct race from the Tamils in ancient times. Philologists have shown that the Malayalam language is an off-shoot of the Tamil language.³ Historical research also shows that the present Malabars of India were Tamils and that the Tamils during the early period had three kingdoms, namely, the Chola, Pandya and Chera Kingdoms. Part of the Chera Kingdom corresponds to the Malabar district.⁴ Hence, in their ethnic origin, the Malabars and Tamils were one; and it would appear that in ancient times a good portion of the Jaffna Tamils came from the Malabar District. Thus, the 'Rajavaliya', an ancient chronicle, describes Kalinga Mandha, a king of Jaffna, and his men as Tamil as Malabars.⁵ This assertion is further supported by the fact that the Mukuwas of Ceylon and the Malabars of India have more or less the same customs and manners. Indeed, Lewis Moore states that the Mukuwas were the aborigines of the Malabars in India.⁶

1 See Balasingham Laws of Ceylon, Vol. I, p.138-140.

2 See 4 N.L.R. 333 at footnote.

3. Vide Comparative Grammar of the Dravidian Languages by Cadwell (3rd Edition, p.18.)

4. Vide "Tamils 1,800 years ago" by Canagasabai Pillai. See also Suriya Narayanan's History of the Tamil Language.

5. 'Rajavaliya', pp.256 and 257.

6. Lewis Moore on Malabar Law and Customs, p.7.

It is also a well-known fact that the Jaffna Tamils have many customs and manners similar to the Malabars of India. Thus, the practice of tying the hair in a knot on the side of the head, which is peculiarly a Malabar custom, prevailed in Jaffna till very recent times. The term used to describe such people was *Kanna Kuchiyar*, meaning thereby, those who wear their hair in a knot on the side of the head. Mudaliyar Rasanayagam says¹: "Kanna Kuchiyar appears to have been a derisive term used for the Malabar immigrants in Jaffna, who had their hair tied in a knot on the side of the head and who perhaps formed the majority of the population, by the other Tamils and Sinhalese inhabitants who had these knots tied on the back of head. Till very recent times most of the Tamils of Jaffna had their hair knot tied in this way. The relic of the Malabar custom of wearing the side knot also continued in Jaffna till about 40 or 50 years ago." Hence, there is evidence that some of the Tamils of Jaffna came from Malabar.

The purpose of our inquiry is when Claas Izaaksz used the term "Malabar" in his code did he intend that the Thesawalamai Code should apply to those people who came from the Chera country and their descendants or to all Tamils who occupied the ancient Province of Jaffna? Many contemporary European writers have used the word "Malabar" as synonymous with Tamil.² Hendrick Zwaardacroon in his memories says that as he has to go to the 'Coast of Malabar' the Thesawalamai should be codified. By the 'Coast of Malabar' he means South India and not that part of the Travancore State which is now known as Malabar.³

Not only the Dutch but Europeans generally appear to have used the word "Malabar" to describe the Tamils. Van Sorge in his collection of decisions entitled "A Collection of the Customs of the Malabar Inhabitants of Pondicherry"⁴ has reported the decisions of the French Courts at Pondicherry where Tamils lived. Bishop Caldwell says:⁵ "The Portuguese ... sailing from Malabar on a voyage of exploration made their acquaintance with the various places on the Eastern or Coromandel Coast... and finding the language

spoken by the fishing and the sea-faring classes on the Eastern Coast similar to that spoken on the Western they came to the conclusion that it was identical with it and called it in consequence by the same name." The Dutch following these European contemporaries, appear to have used the word 'Malabar' as being synonymous with Tamil though there is evidence that when it became necessary to distinguish the Coromandel Coast from the Malabar Coast they used the word 'Malabar' to apply exclusively to the Western Coast of India.

The preface to the Thesawalamai Code written by Claas Isaaksz himself is of interest in this connection. In describing the Country's Laws, he says: "A description of the established Customs, Usages and Institutions, according to which civil cases are decided among the *Malabar or Tamil inhabitants* of the Province of Jaffna on the Island of Ceylon..." Thus, he uses the word "Malabar" as synonymous with Tamil. Hence, the Thesawalamai Code was meant to apply to all Tamils who had their permanent home in the "Province of Jaffna". This is further strengthened by the fact that the Tamil translation of this Code was circulated among the people.

In conclusion it may be said that though a good portion of the people of Jaffna have migrated from Malabar, yet during the Dutch era the Jaffna Tamils consisted of Tamils from both the Eastern and Western Coasts of India and Claas Isaaksz used the word "Malabar" as synonymous with Tamil.

The question whether the term "Malabar" means "Tamil" in the Thesawalamai Regulation is to-day not a matter of mere conjecture but is settled by judicial decisions. In *Chetty v. Chetty*² it was conceded by Counsel in both Courts that the word "Malabar" means Tamil. In the case of *Tharmalingam, Chetty v. Arunasalem Chetty*³ the matter was specifically considered. In this case the Court had to decide whether the appellant was a "Malabar Inhabitant of the Province of Jaffna" within the meaning of the Thesawalamai Regulation. The applicant's father had come from Ramnad long after 1806 and settled down in Jaffna. It was contended that the Thesawalamai did not apply to the appellant. It was urged that according to sections 2 and 3 Ordinance 18 of 1806⁴ the Thesawalamai Code applied only

1. See Catalogue of the Archives of the Dutch Central Government of Coastal Ceylon, 1640-1, 1796 by M.M.Juriaanse; see also Gueletti's preface to the Dutch in Malabar.

2. 37 N.L.R. 253.

3. 45 N.L.R. 414.

4. Cap. 51.

1. See Ancient Jaffna, p.282.

2. See Balasingham's Law of Ceylon, Vol. I, p.138-140.

3. For an etymological derivation of the word "Malabar" see Hobson Jobson - A Glossary of Anglo - Indian Colloquial words and phrases by Yal and Bennett, 1903 Edition, p.539.

4. Pondicherry decisions by Leon-Sorge, President du Tribunal de Premiere Instance.

5. Caldwell's Comparative Grammar, 2nd Edition, pp.10-12.

to those who were the Tamil inhabitants of Jaffna in 1806 and their descendants, who formed a class or group or community like the Kandyans. Alternatively, Counsel for the appellant submitted that the Thesawalamai only applied to people who have come from the Malabar Coast and to those who have emigrated from the State of Travancore and settled down in the Northern Province. Since the appellant did not come within these categories, it was urged that he was not governed by the Thesawalamai.

The Supreme Court rejected these contentions and held that the term "Malabar Inhabitants of the Province of Jaffna" means "Tamils of Ceylon who are inhabitants of a particular province," namely, the Northern Province. Soertsz, J., in the course of his judgment says:¹ "Counsel for the appellant sought to controvert the generally accepted view that the Thesawalamai applied to Tamils inhabiting the Northern Province, and to contend that, in reality it applied not to all Tamil inhabitants of that Province, but only to such of them as were descended from the Malabar Tamils who were inhabitants of Jaffnapatam at the time the Dissawe Isaaksz's collection of customs was given full force by the Regulation of 1806, or if that be regarded as too rigid a restriction then, alternatively, to those Malabar Tamils, and to other Malabar Tamils who had since become inhabitants of the peninsula. For these contentions, Counsel relied, almost entirely on the fact that, in section 3 of the Regulation, it is stated that:

"All questions between Malabar inhabitants of the said Province or wherein a Malabar inhabitant is defendant shall be decided according to the said customs."

He characterised as fanciful and depreciatory of the historical acumen of the Dutch, the view expressed by the trial Judge that the Dutch fell into the error of mistaking all the Tamil inhabitants of Jaffna as Malabars as they resembled in physiognomy, dress and habits, the people whom they found on the Malabar Coast and that they so came to employ the term "Malabar" indiscriminately for all Tamils who had come to Jaffna from the territories of the Chola and Pandya Kingdoms as well. Counsel submitted that the Dutch were well informed in these matters and that they, with a full and correct appreciation of the facts, deliberately made the Thesawalamai applicable only to the Malabar Tamils. If this contention of Counsel is cor-

1. 45 N.L.R. at 416-17.

rect, it would mean that the prevailing view is as to such a conclusion. It would appear that by 1706, the year in which Governor Simons commissioned the Dissawe Isaaksz to collect "The Jaffnapatam ancient customs" according to which persons of this Province are in the habit of recovering in civil matters, etc., there were residents in the Province of Jaffna - Tamils who had come from the Malabar, Chola and Pandya Kingdoms - but all of them probably displaying a preponderant Malabar bias in the matter of customs in consequence, perhaps of the majority of them, or the most influential of them being of Malabar origin. It is difficult to read such well-known authorities as Lewis Moore, Maine and others without being convinced of the Malabar origin of most of the customs appertaining to the general Hindu Law which obtained in other parts of the Deccan, and that fact leads almost inevitably to the inference that even those Tamils who had come from other parts of India such as the Coromandel Coast adopted the Malabar customs. When the question is considered in that way it is easy to understand why in the Regulation 18 of 1806, which gave full force to the collection made by Isaaksz in 1706, it is shortly described as a collection of customs of the Malabar inhabitants. It is worthy of note that in the reproduction of this collection in the appendix to Van G. Leeuwen's commentaries, the translator speaks of it as a collection of "customs, usages, institutions according to which civil cases were decided among the Malabar or Tamil inhabitants, etc., Likewise, Thomson in his Institutes of the Laws of Ceylon, 1806, calls the collection "Thesawalamai or Tamil Country Law." Again in *Thillainathan v. Ramaswamy Chettiar*¹, Bonser, C.J., refers to it as a collection of "The ancient customs of the Tamil inhabitants of the Province of Jaffna." In *Marshall v. Savari*², Clarence, J., with whom was associated Dias, J., said: "We are clearly of opinion that the devolution of the land must be decided according to the Thesawalamai.... The persons concerned.... were all Tamils living in the Mannar District, a portion of the Northern Province." These views have been consistently followed in the later cases. To mention one, there is the well-known case of *Spencer v. Rajaratnam*³ in which Ennis, J., made the observation that "the Thesawalamai are not the customs of a race or a religion common to all persons of that race or religion in the Island; they are the customs of a locality and apply only to *Tamils of Ceylon who are inhabitants of a particular province*." The words I have italicised appear to me, if I may say so respectfully, to state the position concisely and correctly. The Thesawalamai applies to *Tamil with a Ceylon domicile and a Jaffna inhabit-*

1. 4 N.L.R. 328 at 333.

2. 1 S.S.C. 9.

3. 16 N.L.R. 321.

ancy. Both questions, that of domicile and inhabitancy depend ultimately on questions of fact, and in this case, the evidence supports strongly the findings of the trial Judge, that the father of the appellants, although he came from India, settled in this Island, *animo manendi et non revertendi*, and that he, his wife and his son, the appellant and the appellant's wife were inhabitants of the Northern Province.

In the earlier case of *Chetty v. Chetty*¹ the question came up for decision whether the Tamils who belonged to the community known as Vanniya, who had made Jaffna their home for three generations and who had observed the customs followed by other Hindu families were Malabar inhabitants of the Province of Jaffna within the meaning of Regulation 18 of 1806. It was contended in appeal that the Vanniya Chetties were of a different race and that the Thesawalamai only applied to Tamils who were descended from the Tamil inhabitants of the Kingdom of Jaffna. It was urged on behalf of the Respondents that the Vanniya Chetty is the name given to a particular caste among the Tamils and they did not form a distinct race. Their Lordships held that these Vanniya Chetties were Malabar inhabitants within the meaning of Regulation 18 of 1806. Poyser, J., in delivering judgement says.² "It is conceded that the word 'Malabar' used in the above Regulation (i.e., Regulation 18 of 1806) is synonymous with 'Tamil'. It was also admitted in the Lower Court that the parties have a Ceylon domicile. It was argued on behalf of the appellant that the Thesawalamai applies only to those who were Malabar inhabitants of the Province of Jaffna in 1806 and their descendants and does not apply to those Tamils from India or Ceylon who have settled in Jaffna after that date... The District Judge rejected that argument. He pointed out that the Thesawalamai indicated that it was intended to apply to future settlers from India. Clause 17 of Section 1 commences as follows:- 'If a Pagan comes from the coast or elsewhere and settles himself here.' The coast presumably means the coast of India." This clause strongly supports the Judge's finding and indicates that it would apply to Tamils who subsequently became inhabitants of the Province of Jaffna.

In view of these decisions could it be said that a Colombo Chetty who settled down in Jaffna can be said to be governed by the Thesawalamai? In the case of *Savundranayagam v. Savundranayagam*³ it was held that a person who was born in Jaffna and whose father was a Colombo Chetty perma-

1. 1935, 37 N.L.R.253.
2. 37 N.L.R., p.255.
3. 1913, 20 N.L.R., 274.

nently settled down in Jaffna was not subject to the Thesawalamai in the circumstances of that case. It was further held that the burden of proving that Savundranayagam was subject to the Thesawalamai was not discharged.¹

Simon Casie Chetty seems to think that the Colombo Chetties belong to the Tana Vasiya Caste of the Tamils and were subdivided according to the place they occupied.² But in the case of *Savundranayagam v. Savundranayagam*,³ Dr. Paul Peiris who heard the case as a Judge in the first instance, says that the Colombo Chetty community had representatives "in various parts of the Island claiming to be Tamils, Sinhalese or Burghers according to the circumstances and environment." The observation of Dr. Paul Peiris do not necessarily force us to the conclusion that the Colombo Chetties are not Tamils. Individual members of this community may put forward various claims to nationality to suit their circumstances but the fact remains that the Colombo Chetties are Tamils who had migrated from India and settled in various parts of Ceylon and still retain the customs, traditions and the language of the Tamils. Hence, when a Colombo Chetty settles down in Jaffna the answer to the question whether he is governed by Thesawalamai will depend on the manner of settlement and on the family history of the individual. If he has not mixed with other races so as to lose his identity, it is submitted that he should be regarded as a Tamil, and further, if he has "the Jaffna inhabitancy" referred to by Sir Francis Soeretsz, then the Thesawalamai should, on principle, apply to him.

The pertinent question may be asked whether the Thesawalamai applies to the Mukuwas who were settled in various parts of the Northern Province, in view of the fact that their brethren at Batticaloa had their own customary usages. On this aspect Britto says:⁴ "Whether Christians or Saivites, these Mukuwas have their customs and intestate property regulated by the Thesawalamai of that Province." The Mukuwas of Jaffna being Tamils are governed by Thesawalamai if they had a Jaffna inhabitancy.

Meaning of the term "inhabitant"

In order that Thesawalamai may apply it must be further proved that a Tamil is an *Inhabitant of the Province of Jaffna*. Thesawalamai does not apply

1. 20 N.L.R., p.275, per Wood Renton, C.J.
2. See the Castes, Customs and Manners of the Tamils by Simon Casie Chetty, p.36.
3. 20 N.L.R., at 278.
4. See Brito's Mukuwas Law, Introduction, p.1.

to Tamils who have their inhabitancy outside the Northern Province. Thus, in *King v. Perumal*¹ it was held that a Hindu Tamil born in India and settled down in the Central Province of Ceylon was not governed by the Thesawalamai.

In common parlance, the word "inhabitant" means one who dwells or resides in any place permanently; one that has a legal settlement in a town or district.² Before proceeding to examine its full significance in the light of judicial decisions, one may attempt to cite a few dicta culled from the decisions of our Courts which explained this word. Wood Renton, C.J., said in the case of *Velupillai v. Sivakamipillai*³ "I think that the term "inhabitant" must be interpreted in the sense of a person who at the time in question had acquired a permanent residence in the nature of domicile in the Province." Middleton, J., said:⁴ "I think we must construe the word 'inhabitant' in a more extended meaning than is given in the dictionaries from which Mr. Jayawardene derives his definition. I would construe it as indicating a 'permanent inhabitant,' one who has his permanent house in the Province of Jaffna; and, of course, in a measure that question affects the inference as to the meaning of the word 'inhabitant.'" Ennis, J., said:⁵ "In questions relating to domicile there is a presumption of law that the domicile of origin is retained until a change is proved; but it seems to me that when the question is one of inhabitancy, for the purpose of the application of a particular custom, the presumption is not in favour of original inhabitancy, but of actual residence at a particular time; that there is a presumption that a change of residence outside the limits of local custom indicates an intention to depart from local custom."

In this connection it may be profitable to consider the meaning of the term "home" in Private International Law. Dicey says:⁶ "The word 'home' is not a term of art but a word of ordinary discourse, and is usually employed without technical precision: Yet, however, whenever a place or country is termed with any approach to accuracy a person's home, a reference is in-

1. 1911, 14 N.L.R. 496 F.B.

2. See King's English Dictionary, p. 457.

3. 1910, 13 N.L.R., 74 at p.78.

4. 13 N.L.R., p. 76

5. 16 N.L.R., 332.

6. Dicey on "Conflict of Laws," 3rd Edition, p.84.

tended to be made to a connection or relation between two facts. Of these facts, one is a physical fact, the other a mental fact. The physical fact is the person's habitual physical presence, or, to use a shorter and more ordinary term, residence within the limits of a particular place or country. The mental fact is the person's present intention to reside permanently or for an indefinite period within the limits of such place or country or more accurately the absence of any present intention on his part to move his dwelling permanently or for an indefinite period from such place or country. This mental fact is technically termed, not always with strict accuracy, the *animus manendi* or intention of residence. When it is perceived that the existence of a person's home in a given place or country depends on a relation between the fact of residence and the *animus manendi* further investigation shows that the word 'home' as applied to a particular place or country may be defined or described in the following terms or in terms to the same effect: A person's home is that place or country either (1) in which he in fact resides with the intention of residence (*animus manendi*) or (2) in which having so resided he continues actually to reside, though no longer retaining the intention of residence (*animus manendi*) or (3) with regard to which, having so resided there, he retains the intention of residence (*animus manendi*) though he in fact no longer resides there."

These observations would be helpful in construing the meaning of the term "permanent Inhabitant of the Province of Jaffna." Though the incidents of domicile cannot strictly be applied as there is only one domicile in Ceylon, namely, a Ceylon domicile, yet some of the rules governing domicile could, *mutatis mutandis*, be applied in determining the meaning of the term 'Inhabitant of the Province of Jaffna.' Thus Dicey proceeds to state that in a country where several systems of law are applicable, rules governing domicile could be applied *mutatis mutandis* in determining the applicability of some particular system of law to a person.¹

But it must be noted that all rules governing domicile do not apply in determining the question of inhabitancy. For example, in determining the domicile of a person, the presumption is that a person has the domicile of origin unless he has acquired a domicile of choice. But as stated by Ennis, J., this presumption does not apply in considering the question of inhabitancy. Further, a domicile once acquired could be changed even after a marriage,

¹ See "Conflicts of Laws," by Dicey, 5th Edition, p.72.

but it was held in *Velupillai v. Sivagamipillai*¹ that if a person is governed by the law of Thesawalamai at the time of his marriage he cannot change his domicile later to the detriment of his wife. Hence, the crucial question is, at the time of the marriage of a person what is the permanent home of the husband? If his home is the Northern Province and if he is a Tamil, he is governed by Thesawalamai.

Having considered the *dicta* of our Judges in determining the term 'inhabitant' we shall proceed to deal with the case law governing the matter. In the case of *Spencer v. Rajaratnam*² the question at issue was whether a Jaffna Tamil who left Jaffna while he was very young and who settled down in Colombo and married a person in Colombo was governed by the law of Thesawalamai. Wood Renton, A.C.J., in the course of his judgement, said:- "I adhere to the opinion which I expressed in that case of *Velupillai v. Sivagamipillai*³ that the term 'inhabitant' in Regulation 18 of 1806 must be interpreted in the sense of a person who at the critical period has acquired a permanent residence in the nature of domicile in that Province. It is not desirable or possible to lay down any general rule as to the circumstances which will suffice to establish the existence of such a residence. All such cases must depend on its own facts. There may be, on the one hand, a residence in Jaffna which will not suffice to make a Tamil an 'inhabitant' of that Province within the meaning of Regulation 18 of 1806 and, on the other hand, a residence elsewhere even for a protracted period which will not deprive him of that character. An Advocate practicing before the Supreme Court in Colombo, or a government servant permanently attached to the Kachcheri at Galle or Matara might well, if he were a Jaffna Tamil, retain such a connection with his native Province as to entitle him to benefits of its customary law. But the mere fact that a man is a Jaffna Tamil by birth or descent, while it is a circumstance of which account must be taken in considering his real position, will not bring him within the scope of the statutory definition of the class of persons to whom Thesawalamai applies."

In the case of *Spencer v. Rajaratnam*⁴ the Court held that a person who was born of Jaffna parents in Jaffna but who left Jaffna while he was an infant and thereafter resided in Colombo and married a lady from Colombo

1. 1910, 13 N.L.R. 74.

2. 16 N.L.R. 321

3. 1910, 13 N.L.R. 74.

4. 1913, 16 N.L.R. 321

was not governed by the Thesawalamai. In *Fernando v. Proctor*¹ a lady who was the wife of one Jolly Phillips and who was descended from a Jaffna Tamil, settled down at Puttalam and Chilaw. The evidence was that she herself never went to Jaffna. It was held that she was not subject to the Thesawalamai, and it was further held that even Jolly Phillips was not governed by the Thesawalamai, though his father was a Tamil and was employed as a Kachcheri Mudaliyar for about 43 years at Trincomalee and returned to Jaffna after his retirement.

In the case of *Somasunderam Pillai v. Charavanamuttu*,² the question arose whether A, the wife of a Jaffna Tamil, who was married to another Jaffna Tamil B was governed by the Thesawalamai. The father of B was a Jaffna Tamil born in Jaffna and had a permanent home in Jaffna. The evidence disclosed that the father of B resided in Colombo for purposes of employment and that B was born and educated in Colombo. B visited Jaffna occasionally either for purpose of business or on a holiday. The mother of B herself was a Jaffna Tamil and had visited Jaffna several times. It was also in evidence that B was married in Jaffna in 1927, but neither he nor his mother ran a house in Jaffna. In re-examination B said: "I am living in Colombo myself. That is for the purpose of practicing my profession. I am now permanently settled in Colombo." On these facts, the District Judge held that both A and B were governed by the Thesawalamai. But in appeal the Supreme Court reversed the finding of the District Judge and held that both A and B were not governed by Thesawalamai. In delivering judgement Keuneman, J.³ said: "The question that arises on this evidence is whether the second defendant is a 'Malabar Inhabitant of the Province of Jaffna.'"

"As the Thesawalamai is a custom in derogation of the common law, any person who alleges that it is applicable to him must affirmatively establish the fact, *Spencer v. Rajaratnam*, (*supra*). In this case the second defendant (B) has established that he is by descent a Jaffna Tamil but that in itself is insufficient. He must prove he was at the crucial date an inhabitant of Jaffna. I agree that the material date for the purpose of this case is the date of his marriage, viz., the year 1927. It was contended on his behalf that his father was an inhabitant of Jaffna, and that he had not, by virtue of his residence in Colombo for the purpose of business, lost his Jaffna inhabitancy. It was fur-

1. 12 N.L.R. 309.

2. 1942, 44 N.L.R. 1.

3. 44 N.L.R. at 12.

ther contended that where the second defendant was born he must be regarded, by virtue of his father's inhabitancy of Jaffna as having a Jaffna inhabitancy. Also it was argued that principles akin to domicile of origin must be attributed to him. But I think the argument based on the analogous doctrine of domicile cannot be carried to this extent. The fact that his father was an inhabitant of Jaffna may well be a fact that has to be considered, but I think it is not correct to apply any artificial rules in such a case drawn from the law relating to domicile. Each case must depend on its own facts and on the amount of evidence led to prove the inhabitancy. This appears to be the rule laid down in *Spencer v. Rajaratnam*." After summarising the evidence His Lordship says: "I think the evidence is insufficient to displace the presumption that he is governed by the ordinary law of the land or to impose upon him a set of customs applicable only to the inhabitants of the Jaffna Province. I think that the learned Judge erred in holding that the second defendant was an inhabitant of Jaffna. The status of the second defendant will determine that of his wife the first defendant. I hold that the first defendant was not governed by the law of Thesawalamai."

The Province of Jaffna

The Thesawalamai regulation states that it applies to the *Malabar Inhabitants of the Province of Jaffna*. The exact geographical limits of the Province of Jaffna are not easy to determine. There is evidence that the Tamil kingdom included the Northern Province and parts of the Eastern and North-Western Provinces of Ceylon. In dealing with the limits of the Tamil Kingdom, De Queroz says:¹ "This modest kingdom is not confined to the little district of Jaffnapatam because to it are also added the neighbouring lands and those of Vanni which is said to be the name of the lordship which they held before we obtained possession of them, separated from the preceding by a salty river and connected only in the extremity or isthmus of Pachalapali within which were the lands of Baligamo, Temerache, Bedamarache, and Pachalapali forming that peninsula, and outside it there stretch the lands of Vanni. Crosswise, from the side of Mannar to that of Triquillemale, being separated also from the country of Mantota (Montai?) in the jurisdiction of the Captain of Mannar by the river Paragali; which (lands) ends in the river of the Cross in the midst of the lands of the Vanni and of others which stretch as far as Triquillemale which according to the map appears to be a large tract of country." Thus the reader would see that the Tamil kingdom extended over a

1 De Queyroz, Vol.I, p.51.

large area during the reign of King Sangili, the last Tamil King. The Vanni districts were governed by petty chiefs, called Vannias, and it is not likely that Thesawalamai extended to these regions.

The Dutch only applied the term "Jaffnapatam" to the Jaffna Peninsula. This is clear from the instructions from the Governor-General and Council of India to the Governor of Ceylon (1656-1665). In these instructions it is said:¹ "Although the Koopman Van Rhode has been appointed Dissawe and Scholarch over all the districts of Jaffnapatam, the island of Mannar is not include therein." Riejckloff Van Goens, in his instructions to the Dissawe of the District of Jaffnapatam, the islands and the District of Vanni belonging thereto, says² "A force of two hundred lascoreens must be stationed in Jaffnapatam... to this district belong also besides the fair provinces and islands, the lands of the Vanni which are divided into seven provinces; as also the Province Ponneryn, Mantota and Setticoulang." Riejckloff Van Goens in his instructions for the guidance of the Opperkoopman Anthony Pavilion, Commandeur, and Council of the District of Jaffnapatam with the adjacent island and the provinces of Vanni says:³ "The particular jurisdiction of Jaffnapatam is confirmed to four important provinces and eight inhabited and five uninhabited islands beginning with the chief province Welligampatta, in which the castle and the water castle are situated. This province forms property of the Hamentiel or the northern-most point of the Island of Ceylon, stretching on the outer coast east and west up to Colombogam turn, then the following line of the inner coast, having on the east Tinnratchie and on the outer coast to Point Pedro also eastward Warmaratchie which latter provinces separate themselves midland from the province Putchiapally, which like Weligampatte stretches from the outer coast to the inner coast of the Hamentiel and Leriminala on the east at the bay and the commencement of the land of Nonnies and on the east of the province Tineme provinces forming a territory which measures in circumference not less than 40 German miles." Thus we see that the four provinces of Jaffnapatam referred to are Pachialapally, Vadamaradje, Tenmaradje and

1. Instructions from the Governor-General and Council of India to the Governor of Ceylon, 1656-1665, p.76.
2. See Instructions from the Governor-General and Council of India to the Governor of Ceylon, 1656-1665 translated by Sophia Pieters, pp.79 and 80.
3. Instruction from the Governor-General and Council of India to the Governor of Ceylon, 1656-1665, p. 83 translated by Sophia Pieters, pp.83, 84.

Velligaman. The Vanni district though it formed part of the Jaffna District was never regarded as part of Jaffnapatam. This is further strengthened by the notes by De Heer. De Heer in his diary of a tour from Colombo to Jaffnapatam says:¹ "In the afternoon his Honour held, according to the custom of the country, a general paresic of all the inhabitants of the five provinces of this kingdom by Billigamana, Waddenibrasksche, Timmoraatsche, Patchelapalle, and the inhabited islands." Perhaps, during the time of De Heer the Islands were regarded as a separate Province. From what has been said it is clear that the Tamil Kingdom extended to parts of North-Western and Eastern Provinces. The Dutch, however, used the term Jaffnapatam to include only the Jaffna Peninsula and the islands and the Thesawalamai only applied to this area.

But the trend of case decisions is to make Thesawalamai applicable to the inhabitants of the Northern Province. In *Marisal v. Savari*² the Supreme Court held that the Thesawalamai applies to Tamils residing in the Mannar District. Clarence, J., in the course of his judgment says:³ "The persons concerned, including the plaintiff's dead father, were all Tamils living in the Mannar District, a portion of the Northern Province of Ceylon inhabited by a Tamil population to whom the Thesawalamai unquestionably applies." It is unfortunate that His Lordship does not cite any authority for his conclusion. In *Wellapulla v. Sittambalam*⁴ the Supreme Court decided that the Thesawalamai does not apply to the Tamils of the District of Trincomalee and Batticaloa. Morgan, J., in the course of his judgment, says:⁵ "The Thesawalamai or customs of the country was and is undoubtedly in force among the Tamils at Jaffna; was it also in force among the Tamils at Batticaloa and Trincomalee? At first sight it seemed reasonable to assume that it was in force among all the Tamils in the North and Eastern Provinces. The Judges of the Supreme Court, in their report upon the laws and judicial system in Ceylon, preparatory to the introduction of the Royal Charter of 1833, assumed that all the Tamils were governed by it. In answer to question 9, they state:-

"So far as the Malabar inhabitants are concerned, a small collection of customs has been compiled which is printed in English, and denominated the Thesawalamai."

1. Diary of Garrit De Heer translated by Sophia Anthonisz, p.11.

2. 1 S.C.C. 9.

3. 1 S.C.C., p.10.

4. 1872-76, Ram. Reps. 114.

5. 1872-76: Ram, Rep. 114.

In answer to question 91 it is stated that, "the laws applicable to property are very multiplied in Ceylon. The British have one code, the Dutch another, the Mohammedan a third and the Malabar or Tamil a fourth."

Similar passages may be found in Marshall's Digest, pp. 224 and 392. But the opinion of these learned men though deserving of every respect are not conclusive on the question. An exceptional custom, in derogation of the common law of the land is not lightly to be presumed.... On this point we have a valuable report prepared for the Supreme Court by the late Mr. Grenier. He says:-

"Having agreeably to the directions of the Hon'ble the Chief Justice, made necessary inquiries with a view to ascertaining whether Batticaloa formed an integral part of the district of Jaffna, during the administration of the Dutch Government or not, I beg to submit the result of my inquiries for the information of the Supreme Court."

"It appears that the first Agent of Government appointed to Jaffna soon after the subjugation of the Island to the British arms, was Lieut-Colonel B.G. Barbut, who was styled or called Commissioner extraordinary of Revenue and Commerce for the Northern district, with an assistant E.J. Van Logan, Esq., and that so far back as 1801. The jurisdiction of Lieut-Colonel Barbut extended only to Calpenty, Mannar, Vertelitivo, Puttalam, Mullativoe, Kaits and Point Pedro, and the vicinities thereof. It does not at all appear that Colonel Barbut had any control or jurisdiction, either of a political, revenue or magisterial nature, over Trincomalee and Batticaloa, which it is evident must have been therefore governed by a different functionary."

"So far it is beyond the possibility of a doubt that the country law or Thesawalamai was designed to have effect only in the Province of Jaffna of which Batticaloa or Trincomalee never formed a part of parcel."

"By the proclamation of 1835, dividing the districts, the Northern Province was said to consist of the country hitherto known as the district of Jaffna, Mannar and the Vanni. By the words hitherto known, it must be evident that Batticaloa and Trincomalee were never known or recognised as part of the Northern Province, but were always excluded therefrom."

"The Government Agent (Mr. Dyke) on whom I called recently for information connected with the above inquiry, was pleased to inform me and

indeed it was his decided opinion founded upon some public act of Colonel Barbut, which he had once seen, but which cannot be found out now—that Batticaloa and Trincomalee never formed an integral part of the Northern Province, but in fact they were separate districts or provinces not connected with Jaffna at all."

"Under all the circumstances as developed above, it appears most clearly and satisfactorily that Batticaloa and Trincomalee did not belong to the province or district of Jaffna, either under the Dutch or English Government, and that moreover, the Thesawalamai or country law was never intended to be rendered applicable to Batticaloa and Trincomalee.

This belief is further strengthened by various passages in the letter of Sir Alexander Johnstone to His Majesty's Government which forms the preface to the country law.

"Note - It also appears that there is a separate Governor at Trincomalee under the Dutch Government in 1786."

Mr. Grenier was long a resident of Jaffna, and held for many years the office of Secretary of the District Court. In that capacity he had abundant opportunities of forming an accurate opinion on the subject. He is supported by the late Mr. Dyke, no higher an authority than whom could be quoted. It will thus appear that the Thesawalamai was only in force among the Malabar inhabitants of the Province of Jaffna."

In the above case the only matter for decision was whether the Thesawalamai applied to the Tamils of the Eastern Province of Ceylon. But the judgment is of interest in determining the geographical limits of the Province of Jaffna. It is clear from Mr. Grenier's report that according to his researches the term "Province of Jaffna" extended up to Puttalam in 1801. It was only in the year 1835 that Ceylon was divided into nine provinces and the present limits of the Northern Province of Ceylon determined.

It has been shown that during the Dutch regime the Province of Jaffna duly comprised of the Jaffna Peninsula and the islands. The jurisdiction of Lieut - Colonel Barbut, the first Government Agent of the North, might have extended over the Province of Jaffna and other Provinces. The limits of his jurisdiction appear to have included a wider area. One is not justified in identifying the limits of his jurisdiction with the Province of Jaffna in 1801. In

strict theory the Thesawalamai is only applicable to the Tamil inhabitants of the Jaffna Peninsula and the islands, but in view of the decision of the Supreme Court the term 'Province of Jaffna' is considered as co-extensive with the Northern Province of Ceylon. The Supreme Court appears to have been guided by Mr. Grenier's Report. Mr. Grenier's Report is based on arguments which are based on the fallacy discussed earlier.

In this connection the report of the Commissioner appointed in 1920 by the Government of Ceylon to inquire into and report upon the desirability of introducing legislation for defining the persons or class of persons to whom the Thesawalamai applies, will be of interest. The Commissioners referring to the term "Province of Jaffna," say:¹ "It did not include Trincomalee and Batticaloa though they were populated by the Tamils, but it included the Districts of Mannar and Mullaitivu and that the extreme Southern limit was the line separating Chettikulam from Nuwara Kala Viya." This roughly corresponds to the Northern Province of Jaffna. It is difficult to visualize on what materials the Commissioners come to this conclusion. As stated earlier, the Province of Jaffna in 1806 does not correspond to the Northern Province of Ceylon. The Matrimonial Rights and Inheritance Ordinance² and the Married Women's Property Ordinance³ enact that these two ordinances would not apply to Tamils of the Northern Province governed by Thesawalamai. By implication, the law of Inheritance and Matrimonial Rights and Liabilities of the Tamils who have their permanent home outside the Northern Province will be governed by these Ordinances.

DOES THESAWALAMAI APPLY TO PROPERTY OUTSIDE THE NORTHERN PROVINCE?

We have already stated that Thesawalamai is both a local law and a personal law, that is to say, certain portions of the law of Thesawalamai apply to all lands situated in the Northern Province, whoever may be the owner, and the rest applied to all Tamils who are regarded as inhabitants of the Northern Province. This statement must be fully investigated.

The question as to whether the Thesawalamai is a personal law or a local law has been well answered by Bertram, C.J., in a learned judg-

1. See Sessional Paper 230 of 1930.

2. Cap. 47.

3. Cap. 46.

ment in the case of *Seelachchy v. Visuvanathan Chetty*.¹ He says:² "To what extent and in what manner does the Thesawalamai apply outside the Northern Province? This is an important question which has been previously discussed both in the Courts and outside them. I observe that in the evidence and documents published in connection with the Thesawalamai Commission, it was assumed by more than one prominent witness that the Thesawalamai did not apply to property 'outside Jaffna,' and that the late Mr. William Wadsworth in an interesting memorandum expressed the opinion that 'looked at from every point of view there cannot be any doubt the Thesawalamai Code is both a personal and a local law applicable to the Tamils of the province of Jaffna and to property in Jaffna.'" When we are dealing with Customary Law such extra-judicial utterances by a person well acquainted with local customs are entitled to consideration."

"The question has also been discussed in two cases in this Court, namely, *Velupillai v. Sivakamipillai*³ and *Spencer v. Rajaratnam*.⁴ The arguments in these two cases covered a wide range, and observations were made in the judgments which seemed to have a bearing on this question, but if the facts be carefully examined, it will be found that these observations are wholly *obiter* and that the actual decisions in both cases have no bearing on the present question.... For certain purposes the Thesawalamai applies to all immovable property within the Province. Nothing is expressly said in the judgment with regard to its effect on immovable property situated outside that Province. This, in the present connection, is the problem that remains for us to determine. It was suggested in that case in the argument by Mr. Elliott that the true principle is this "The Thesawalamai may be divided into two heads. One part deals with personal relations, etc., which Jaffna Tamils carry with them wherever they go. The other part deals with land tenure and other matters which are purely local." We are not called upon to give a decision on the whole of this interesting and broad proposition which seems intended among other things to comprise the law of succession. We are simply concerned with the mutual proprietary relations of husband and wife subject to the Thesawalamai with respect to immovable property acquired during the continuance of the marriage, but situated outside its special realm."

1. 23 N.L.R. 97.

2. 23 N.L.R. at p.112 see.

3. 1910, 13 N.L.R. 74.

4. 1913, 16 N.L.R. 321

After citing extracts from Voet's Title on *De Ritu Nuptiarum* ¹Bertram, C.J., says:² "There are two supplemental matters which deserve remark. In holding that, so far as relates to the mutual property-rights of husband and wife, the Thesawalamai, though primarily of local application, may affect property outside the sphere of its special operation, I desire to say **nothing** of its possible application in matters of inheritance. That question must await a case in which it is specifically raised. I will only say that when the question comes up for consideration much light may be derived from a study of the paragraph in Voet's chapter '*De Ritu Nuptiarum*, to which I have referred above.'" In view of the reference of Bertram, C.J., to Voet, it is best to cite the passage in Voet dealing with this aspect. Voet says:³ "The marital control extends to more kinds of property and is more absolute in some places than in others. Consequently, it is not very clear which local law ought to be chosen in deciding how far and to what property the marital control or curatorship over the person and property of the wife extends. Some people think that all questions of this sort ought to be decided according to a single law of one domicile so that the husband is entirely governed as regards the extent of his marital control by the law of the domicile, and the wife on the other hand is entirely governed by the same law with regard to acting without her husband's consent, whether in suing, or contracting, or binding both herself and her husband. And (they say that) this applies in all cases, even with regard to immovable property situated in other localities and consequently subject to another law." After referring to the argument of those who support this view, he says: "But since the assertion as regards a personal statute having force outside the territory of the person who makes the statute has already been confuted in (1-4 paras 2-7 and 8) the more correct view is that the law of the domicile, of the husband ought to be considered (when determining the extent of the marital control and what a wife under the marital control can legally do without the assistance of the husband), in those cases where there is a question as to movable property, which by a legal fiction is taken to be present in the place of the domicile, though as a matter of fact it is elsewhere. But as to property which is immovable, the law of the place where such property is situated is to be regarded, provided it has not been proved that there is some relaxation of the rigour of the law arising from an expressed understanding between neighbouring people or from an inveterate custom equivalent to a tacit understanding; and thus out of courtesy,

1. Voet, 23.2.

2. 23 N.L.R. 118

3. 23.2.60 Stoney's Tran., p. 55.

with regard to immovable property situated elsewhere, the customs existing in the place of the domicile of the husband and wife with regard to the marital power over the wife and her property are respected by the Magistrate. The same arguments apply which are mentioned (4.4.48) with regard to minority and the duration of guardianship or curatorship where there is a discrepancy between the statutes of different places."

It must be observed that Voet is dealing with countries under the sway of different counts and is not considering the case where the different places are under the power of the same sovereign. Commenting on the decision in *Seelachchy v. Visvanathan*,¹ the Thesawalamai Commissioners said:² "The question whether, in the case of persons who are subject to the Thesawalamai such of their property as is situated outside the Northern Province should be governed by the Thesawalamai, so far as matrimonial rights and inheritances are concerned, is one which presently is not settled. In *Seelachchy v. Visvanathan*³ Sir Anton Bertram, C.J., was of opinion that, so far as the mutual proprietary rights of husband and wife were concerned the Thesawalamai might affect property outside the sphere of its local application, he was not prepared to say anything as to its possible application in matters of inheritance. The question should not be left in uncertainty, and we have agreed that such property as regards matrimonial rights and inheritance, be governed by the Thesawalamai."

The Jaffna Matrimonial Rights and Inheritance Amendment Ordinance No. 58 of 1947 gives effect to these recommendations by amending section 3 of the Jaffna Matrimonial rights and inheritance 1 of 1911 by substituting for the word "applies" the words "applies and it shall apply in respect to their movable and immovable property wherever situated." The effect of this amendment is to make the Matrimonial Rights and Inheritance Ordinance applicable to all properties of a person subject to the Thesawalamai, whether situated in the Northern Province or any other part of Ceylon.

A distinction has to be made between immovable property situated in and outside Ceylon. If the immovable property is situated outside Ceylon, then the law of Intestate Succession will be the *lex situs*, whether we apply

1. 23, N.L.R. 97

2. Sessional Paper III of 1930, p.3

3. 1922, 23 N.L.R. 97

the English Law¹ or the Roman-Dutch Law.²

If the immovable property is in Ceylon we need not go into the recondite mysteries of the Roman-Dutch Law or statutes or modern rules of Private International Law in England but should rather guide ourselves by the statute law of Ceylon. The Thesawalamai Code makes no distinction between immovable property situated in the Northern Province or immovable property situated outside it. The Matrimonial Rights and Inheritance Ordinance (Jaffna) says: "that *any property* acquired by either spouse during the subsistence of the marriage is *Thediatettam* or acquired property." The Ordinance states the law of intestate succession of persons governed by the Thesawalamai. Hence, it is submitted even where the person governed by the Thesawalamai dies in a foreign country leaving immovable property in Ceylon the law of intestate succession will be the Thesawalamai. Thus, we have seen that the matrimonial rights and liabilities of the spouse governed by the Thesawalamai and the law of intestate succession to movables wherever they may be situated and to immovables situated in Ceylon should be governed by his personal law. All doubts on this matter are now removed by the Jaffna Matrimonial Rights and Inheritance Amendment Ordinance.³

RECENT DECISIONS ON CHANGE OF DOMICILE

There are two recent important cases on the applicability of Thesawalamai. In *Sivagnanalingam vs. Sunderalingam*⁴ the following propositions were laid down by the Supreme Court on the applicability of Thesawalamai.

1. The meaning of the ordinary words is a question of fact but the meaning to be attributed in enacting words is a question of law. The meaning of the expression "inhabitants of the Province of Jaffna" is a question of law.
2. Inhabitant' means permanent inhabitant, who has his permanent home in Jaffna, in the nature of a domicile in the Northern Province. However, since there can only be a Sri Lanka domicile, and to that extent the term differs from the expression "inhabitant",

1. Dicey on Conflict of Laws, 5th Edition.

2. See Voet Book I, tit. IV, Part II, Paras 3.7

3. No. 58 of 1947

4. 1988 1 S.L.R. 86

the idea of a permanent home, in the concepts and rules for identifying a person's domicile, can be applied to whether a family's permanent home is in the Northern Province and hence whether its members are inhabitants of that Province.

3. There is a strong presumption in favour of the continuance of a domicile of origin. The burden of proving the change of domicile from one of origin to one of choice is heavy and with regard to the standard of proof itself to rebut the presumption, the judicial conscience must be satisfied by the evidence of change. Otherwise the domicile of origin persists. The acquisition of a domicile of choice is a serious matter and should not be lightly presumed.

The rules governing applicability of Thesawalamai, as set out by the Supreme Court in *Manikkavasagar vs. Kandasamy*¹, were as follows:-

1. The burden of proof is on the party who alleges that Thesawalamai applies to a person and therefore he has to prove it.
2. It is not every Tamil who is governed by Thesawalamai but it must be shown that he has permanent residence in the Northern Province.
3. Since the applicability is based on the doctrine of domicile, a Tamil governed by Thesawalamai may change his domicile but strong proof is necessary that he is no longer governed by Thesawalamai.
4. The same presumption must be applied to resolving the question of whether there was a change in inhabitancy and there must be a clear intention of abandoning the old inhabitancy.
5. The Thesawalamai is a personal law of the Tamil inhabitants of the Northern Province and it applies to them wherever they are and to their movable and immovable property situated in Sri Lanka.
6. For the purpose of deciding the right of inheritance to the estate of a deceased husband, the time of death is the relevant time and not the time of marriage.

1. 1986 2 S.L.R. 8

The principle laid down in this case shows that a person governed by Thesawalamai can change his domicile by clear evidence, that must satisfy the Court, to show such change. In *Manikkavasagar vs. Kandasamy*¹ it was held by the Supreme Court that, Thesawalamai being an exceptional law, it is incumbent on any person who asserts that a person is governed by Thesawalamai to prove such facts and furthermore if a person asserts that a property was *The diatettam* or acquired property, he must prove that it was acquired, not through converted property, but during the subsistence of the marriage. Since the petitioner failed to prove these facts she was not granted the relief sought in the case. Even an Indian Tamil not a citizen of Sri Lanka who is settled in the Northern Province is governed by Thesawalamai. It is applicable to all Tamils settled in the Northern Province of Sri Lanka. This case also interpreted the provisions of the Jaffna Matrimonial Rights Amendment Ordinance of 1947 which interpretation is dealt with in a later chapter.

Subjects Governed by Thesawalamai

The Thesawalamai Code itself states in what matters persons who are subject to this customary law are governed. The collection is described as "Description of Jaffnapatam Ancient Customs and Rules according to which persons of the Province are in the habit of recovering in civil matters such as Inheritance, Adoptions, Gifts, Seizure, Purchase, and Sale Pledging and Redemption of Lawn and Gardens, etc., drawn up and collected...."

It is not possible to enumerate in detail the various matters in which a "Malabar inhabitant of the Province of Jaffna" is governed by the Thesawalamai. The reader will gather this knowledge as he peruses the pages of this work. The Law of Pre-emption, *otty* mortgage and Servitudes peculiar to the law of Thesawalamai have a local application and only apply to lands in the Northern Province whoever may be the owners. Law sub-serves social needs. At the time Claas Isaaksz codified the Law of Thesawalamai, the main pursuit of the people was agriculture and therefore the subjects, dealt with were those that frequently arose in a rural society. With advancing civilisation new problems have to be dealt with.

As stated earlier, on matters that are not provided for by the Thesawalamai the general law of the land is applied.

1. 1986 2 S.L.R. 8

CHAPTER V

SLAVERY

Slavery as it existed under the law of Thesawalamai has become extinct. But the student of the social sciences will not understand the structure of Tamil Society unless he has studied the law of slavery and the caste system prevailing in Jaffna. Even a student of law will not understand the legal institutions and the law applicable to the Tamils in its proper setting unless there is a discussion of this subject. Hence, an attempt is made to deal with the incidents of slavery under the Thesawalamai.

Slavery under the Thesawalamai and Slavery under the Roman Law

Before dealing with the incidents of slavery, it will be instructive to compare slavery under the Roman Law and the law of Thesawalamai. Slavery under Thesawalamai originated either by birth or by purchase. Under the *Jus Gentium* of the Roman Law the methods of enslavement were the same; perhaps, in addition, by capture in war a person became a slave.¹ Under the Thesawalamai too, during the time of the Tamil Kings, capture in war was a recognised method of enslavement. Once a person became a slave he was treated as a *res* under the old Roman Law till his condition was ameliorated firstly by the Praetor and later by Imperial Legislation. Under the law of Thesawalamai, the master had the right to the slave's services and the slave was regarded as his property. The slave appears to have been maltreated by the master. The inhuman practice of maltreating and killing slaves was abolished by Proclamation dated 3rd January, 1821.² It appears from the statement of the Modelliairs that during the Dutch period, on the payment of a fee, a slave was imprisoned by the Dutch Government at the instance of the master. Under the Roman Law the child of a female slave, subject to certain exceptions, became the property of the Master.³ Similarly under the law of

Thesawalamai, the child of a female slave became the property of the master. But, if the father of the child was owned by a different master, he could appropriate to himself a male child if there were several children by such a union. Under the early Civil Law, a slave could not own or enjoy any property which he acquired. Such property ensured to the benefit of the master. The slave was allowed to enjoy his *peculium* but the master could resume possession of the slave's *peculium* at his will and pleasure.¹ Under the law of Thesawalamai the result was the same. Where the master allowed the slave to possess the properties, the slave took the produce from such properties but the master could resume possession in certain contingencies. The master who emancipated his slave had the right of succession under the Roman Law to the freed man's estate if the latter died without children.² Under the law of Thesawalamai the master had a similar right. Both under the Roman Law and the law of Thesawalamai emancipation was recognised.

Slavery among the Sinhalese

Slavery among the Sinhalese appears to stand on a different footing. Colebrook in his report says:³ "There is reason to infer that some of the subordinate castes were originally slaves, who, in the revolutions of the country, were left to provide for their own support and were recognised on the footing of servile castes, deriving their subsistence from the land." Dr. Hayley, commenting on this, says:⁴ "This view gains some support from the fact that among the Tamils of the North slavery was, up to comparatively recent date, the recognised status of four castes: Kovias, Chandars, Pallas and Nallavas. On the other hand, the character of the institutions as it existed among the Sinhalese, does not support the theory, and it is remarkable that even captives taken in war were not necessarily enslaved." Dr. Hayley states that unlike the Tamil slaves of the Northern Province, who were chiefly labourers in the fields, the Sinhalese bondsmen were for the most part personal attendants. Thus, slavery was of the mildest form. Absolute in law, it was in practice tempered by a large amount of liberty and kindness not being even incompatible with official power or position of trust. To use Dr. Hayley's words: "It was of the same type as household slavery in ancient Greece and Rome, not the bondage of the West Indian Plantations."⁵ The curious feature is that any

1. Buckland Text Book of Roman Law, 2nd Edition, pp.67-68.

2. 1833 Enactment, Vol.I, 214.

3. Buckland, p.68.

1. Leage, 2nd, p. 62.

2. Sohm's Roman Law, p. 221.

3. Ram. 1820-33, p.221.

4. Hayley's Kandyan Law, p.133.

5. Hayley, p.133.

person, whatever his caste may be, became a slave.¹ This accounts for the disparity of status between the Sinhalese and Tamil slaves. Thus, we see the institutions of slavery widely differed among the Sinhalese and the Tamils owing to historical and economical factors.

SLAVERY AMONG THE TAMILS

The Thesawalamai Code states that slaves of Jaffnapatam were divided into four castes, viz., Koviars, Chandars, Pallas and Nallavars.²

The origin of the Koviars is obscure. According to one view, the word *Koviyar* is a corruption of the word *Koyilar* which means, servants of the temples. According to this view the Koviars were originally free people and were the servants of the temple. Later, through poverty they sold themselves as slaves of the temples. When the temples were destroyed the temple managers sold their slaves to private persons.³ According to another view the word *Koviyar* is derived from the words *Ko*, *Idayar*, which means cowherds. They were cowherds brought from various tribes in South India during the Dutch period.⁴ According to another view, the *Koviars* are the *Goiyas*, the farmer caste among the Sinhalese who were left behind when the Tamils conquered Jaffna. The Thesawalamai Code itself referring to the *Koviars* and *Chandars* says: "It would be a matter of great difficulty to find out that the two former castes were slaves from their origin; as it is supposed that some of them were sold in ancient times by their parents or friends to others. This supposition is entertained especially with respect to the *Koviyar* caste, the greatest part of whom are slaves at present."⁵

The Chandars

Referring to the *Chandars*, the Thesawalamai Code says: "The slaves of the second caste, viz., the *Chandars*, are but few in number and those of this caste as were in slavery were not registered in the thomboos as *Chandars* but under the denomination of *Koviars* so that the remaining part of them are free and perform Government services in the same manner as the *Vellalas*,

1. Hayley, p.135.

2. Thes. Code, Section 8 (1).

3. "Yalpana Vaipava Malai, Satehinantha Press, 2nd Edition, p.57.

4. See Early Settlements in Jaffna by Sivanathan, 1933 Editions. Art Printing Works - Kuala Lumpur, pp. 18 -19.

5. "Yalpana Vaipava Malai, Satehinantha Press, 2nd Edition, p.57.

and these *Chandars* perform their ordinary *uliyam* (service) or Government service, during one day in every month, besides which they are obliged to provide the elephants of the Government in the stables of the Province with food, together with the *Pullas* and *Nallavas*, and also to assist in carrying the *pallakkus* (palanquins) and the baggage of the Company's Civil Servants of rank."

Though the *Chandars* are described by the Thesawalamai as slaves, it is significant that the various regulations that deal with slavery only refer to the "Covia, Nallua, and Pallu" slaves and not to the *Chandars*.¹ Therefore, it may be presumed that during the British period the *Chandars* were not regarded as slaves. The Thesawalamai Code refers to a state of society that existed during the period when Claas Isaaksz collected the customary usages.

Nallavars

The *Nallavars* are said to be the "Nambes" who displaced the *Sanar* and took to climbing palmyrah trees.² The word "Nallavar" is derived from the word *Nalua* which means to climb and therefore this inference may be correct. The Thesawalamai Code says that "from their origin the *Nallavars* were slaves, unless the master through compassion had emancipated them."

Pallas

The *Pallas* were labourers who left India in the hope of finding employment in the field belonging to the land-owning classes, the *Vellalas*. They are said to have come in large numbers and most of them met with disappointment. Some are stated to have returned to India and others remained behind and took to climbing palmyrah trees.³ The Thesawalamai Code says that they were slaves from their origin.

We have very little information about the status of these slaves during the period of the Tamil Kings and the Dutch period except what is found in the Thesawalamai Code.

1. *Vide* Proclamation dated 15th January, 1779, Regulation 9 of 1818, Regulation 10 of 1818, Regulation 8 of 1821; Regulation 14 of 1823; Regulation 10 of 1818; Ordinance 3 of 1887 and Ordinance 7 of 1842.

2. See "Yalpana Yaipakam," p.56.

3. "Yalpana Yaipakam," p.56.

THE RIGHTS AND DUTIES OF THE MASTERS

Right to Exact Services

It is stated that when the male and female slaves live separately from their masters they are obliged to earn their own livelihood in such manner as they think proper, but they are obliged to perform the Government services for their masters whenever they were required to do so, on which occasions the masters were obliged to maintain the slaves during that period. But if the slaves failed to perform the Government services as a result of which the master was forced to pay the *chikku money*, then the slaves were forced to pay the same. It is stated in the Thesawalamai Code that such neglect is not to be attributed to the masters but to the slaves, because they have received maintenance for they have been employed and have deceived their masters.¹ The Thesawalamai Code states that "they must also be ready when required by their masters to repair the fences of their master's lands, provided they received maintenance during the time they were doing work for their masters."²

Right to Control the Marriage of the Slaves (Now Obsolete)

When the slaves wished to get married they were obliged to inform their masters of their intention and the consent of the master had to be obtained. When such consent was obtained, they obtained a certificate from their master and produced the same to the school-master of the church to which they belonged and the certificate had to be produced before the marriage ceremony was performed.³ Generally, the proprietors only gave their consent if there was an inter-marriage with their own slaves, but if the circumstances did not permit such a union, then they preferred their male slaves to enter into matrimony with female slaves of other persons. But Government male slaves were only permitted to marry Government female slaves.⁴

Right of Appropriating Children

The children of female slaves belonged to the master. But if a male slave married a female slave belonging to another, the master of the male slave had at one time the right to appropriate a male child, if there were several children by such a union. But the master did not have the right to appropriate the girls. The Thesawalamai Code says that this right is not enjoyed by any one except the Government.

1. Thes. Code VIII, 2 (1901) L.E. Vol. I, p.22.

2. Thes. Code, Section VIII (2) (1901), L.E., Vol. I, p.22.

3. Thes. Code, Section VII (2) (1901), L.E., Vol. I, p.22

4. Thes. Code,

Rights Over the Slaves' Properties

When one considers the provisions of the Thesawalamai Code, it would appear that the slaves were permitted to possess properties. If the master wished to sell the slave he had the right to appropriate to himself the whole of the property and obtain possession of the same, but if the master through negligence allowed the slave who was sold to possess the properties, the seller cannot in that event have any claim to such property.¹

The question may be asked whether the slave had any dominion over his properties. In this connection it will be profitable to reproduce the provisions of Section VIII, sub-section 6, which deals with the gift of a slave girl. The Code says: "when a slave girl is gifted she lost all her rights to her parents' property." The reason given is that "all the property of such parents when they are slaves appertain to their master." From this, one can infer that a sort of qualified dominion was in the master and the slave was permitted to enjoy the produce of the properties. But when the slave was sold, such properties passed along with them to the new master unless the old master appropriated to himself all the properties.

Right of Inheritance to the Property of a Slave

When a slave died without any issue the deceased's master, if the deceased's brothers and sisters be slaves of other persons, could appropriate to himself such inheritance and dowries as were brought by the deceased on the occasion of his marriage and also half the property acquired during the deceased's marriage. But if the brothers and sisters of the deceased slaves were also owned by the same master, then they were permitted to possess such property, unless the proprietor of the slaves himself is in indigent circumstances and has nothing to subsist on.²

Right to Exact Yearly Contributions

The master could exact an yearly contribution of 4 *fanams*³ in cash from the Nallawar and Pallas slaves who live apart. This right was only given to the master if the slave did not live with him. We are not told what happened when the slaves neglected or refused to pay this amount.⁴

1. Thes. Code VIII sub. 6 (1901) L.E., Vol. I, p. 24.

2. Thes. Code I (5) (1901) L.E., Vol. I, p.24.

3. A Dutch coin equivalent to 6 cents.

DUTIES OF MASTERS

Duty of Maintenance

So long as the master employs his slaves he had to support them. This is clear from many provisions found in the Thesawalamai Code.¹ The duty of maintenance ceases the moment the employment is over.

Duty to Defray Certain Expenses

When the female slaves brought forth children the master had to provide them with such articles as were required for that purpose. When the female slaves were *Nallawars* or *Pallas* they were permitted to pawn the child for six *fanams*, but the child could redeem himself. The children of the *Koviyars* and *Chandars* could not be pawned.²

ORIGIN OF SLAVERY

Slavery could have originated under the old Thesawalamai law by birth, by purchase, by some other mode of acquisition or by recall into slavery.

1. By Birth

The children of female slaves belonged to the master. As previously stated the master of the male slaves could appropriate a male child if the slave had several children.³

2. Purchase : Gift Inheritance or Some Other Way of Acquisition

A slave being treated as a chattel could be acquired by purchase, gift or some other mode of acquisition. When a person acquired a slave, under a regulation passed during the early British period, the slave had to be registered.⁴

3. Recall into Slavery

The compiler of the Thesawalamai Code says that there was an old heathen custom in the Coromandel Coast that when a slave who is freed was insolent to his former master he can be reduced into slavery.⁵

1. *Vide* Thes. Code VIII, sub.5 (1901) L.E., Vol.I, p.23.

2. Thes. Code VIII, sub. 6 (1901) L.E., Vol.I, p.24.

3. Thes. Code VIII, sub. 4 (1901) L.E., Vol. I, p.23.

4. Reg. 13 of 1806 and Reg. 3 of 1808.

5. Thes. Code VIII (8) (1901) L.E., Vol. I, p.25.

SLAVERY

1. By Non-Registration

During the early British period a slave became free if the master had failed to register the slave.

2. By Operation of Law

It was enacted that a female slave should become free by regulation No.8 of 1821. Hence, after the passing of the regulation all female slaves were freed.

3. Emancipation

This is the only voluntary mode of freeing a slave known to the old Law of Thesawalamai. A distinction was made between masters who had no children and those who had children. The Code states: "When a man, whether married or not, has no child or children and intends to emancipate a male or female slave inherited by him, he is obliged to announce his intention to the school-master of the church to which such female or male slave belongs, and to request that he will publish in the church his intention on three successive Sundays in order that his community, especially those wishing to oppose such intention, may get notice thereof in due time and be able to institute such claims as they think they have to such slaves, and should any person come forward during the time that such publication takes place, both they as well as the person wishing to emancipate the slave must submit to the decision of such arbitration as they choose to appoint thereto; yet if a married man bearing no children wishes to emancipate a male or female slave appertaining to his wife's dowry he must do so with his wife's consent. And such emancipation must further take place in the manner heretofore stated with respect to a single man; but husband and wife having children, may emancipate one or more slaves according to their pleasure. When a person has a child by his own female slave, he may emancipate such child without the consent of his heirs and may also make some donation to such child out of his hereditary property."¹

EMANCIPATED SLAVES' SUCCESSION

The Thesawalamai Code makes provisions of the succession of emancipated slaves in certain contingencies. It says:² "In case as emancipated male or female slave happens to die childless, leaving behind him brothers and sisters by his or her mother's side, and if among the deceased's brothers and

1 Thes. Code VIII (7).

2 Thes. Code VII (8).

sisters only one has been emancipated, the emancipated brother or sister of the deceased only inherits from the deceased; yet should none of the deceased's brothers or sisters by the mother's side have been emancipated, in that case the legitimate children of the deceased's father are the heirs, should there be any. But in the contrary case the goods left behind by a deceased person of the above description devolve again upon the persons from whom such property was received by the deceased and afterwards to their heirs."

SLAVERY DURING THE BRITISH PERIOD

The law governing slavery, as stated so far, is taken from the Code prepared by Claas Isaaksz in 1707 during the Dutch regime. When Ceylon became a Colony under the British it was not possible to abolish slavery by a stroke of the pen. By a gradual process this social reform had to be undertaken. It is to the British that we owe a deep debt of gratitude for finally abolishing this ugly institution that marred our society.

We shall consider the legislative measures by which the slave's condition was ameliorated. By Proclamation, dated the 15th January, 1799, it was announced that those who were slaves shall continue to be slaves. This Proclamation enacts "that such persons as were considered slaves by the existing laws of the Island on the first day of the present January, shall continue to be the private property of those to whom they belong; and may be transferred from one person to another resident in the Island according to the rules prescribed by the late Government, but are not to be disposed of out of the Island, under the penalty of 500 Rix Dollars, one-half of which is to be paid to the informer and the other half to the slave." It is also stated further that these provisions should not apply to slaves brought by the master of a vessel for his own service.¹

The British Government also recognised the customary laws pertaining to slavery. In 1806 the British Government made the following provisions: "All questions that relate to those rights and privileges which subsist in the said Province between the higher castes, particularly the *Kovias*, *Nallavars* and *Pallas*, and the other, shall be decided according to the customs and ancient usages of the Province."² It became necessary to keep proper registers of

the slaves. Regulations No. 13 of 1806 and 3 of 1808,¹ required registration of *Kovias*, *Nallavars* and *Pallar* slaves in Jaffna. Penalty for non-registration was the forfeiture of the slaves. This penalty was suspended by Regulation 8 of 1818.² The next legislative measure dealing with slavery is Regulation 9 of 1811.³ The preamble to this Regulation says that it is a Regulation "for securing to certain children emancipated by the proprietors of their mothers the full benefits of such proprietors' intentions and for establishing an efficient registry of all slaves and abolishing the joint tenure of property in the same." Section 1 of this Regulation states that certain proprietors of slaves in the Maritime Provinces whose names are mentioned have voluntarily freed their slaves and that the Prince Regent has accepted the generous offer. The section proceeds to state that such liberated slaves should be deemed to be freed from the 12th August, 1816. This Regulation appears to have been passed to define the status of these emancipated slaves and did not affect the *Koviyars*, *Nallavars* and the *Pallars*. Regulation 10 of 1816 was enacted to give jurisdiction to certain Judges to try claims to slaves. These Regulations, however, did not have much effect in Jaffna where the masters seldom emancipated their slaves voluntarily. By Regulation 8 of 1821 an attempt was made to purchase and free the slave children of the *Koviyar*, *Nallavar* and *Pallar* caste. It was enacted by this Regulation that all female children who shall be borne of a female slave of the *Koviyar*, *Nallavar* or *Pallar* caste on or after the 24th April shall be free.⁴ The masters were given compensation for such loss.⁵ By Section 7 of Regulation 8 of 1821 the slaves of the Government were declared free. It is said in this section that "although the British Government had invariably refrained from exercising any dominion over the persons of the *Koviyars*, *Nallas* and *Palla* castes, yet a formal declaration of their freedom was necessary."

Regulation 14 of 1823⁶ extended the term during which the registration of *Koviyars*, *Nallas* and *Palla* slaves is to take place till 31st May, 1824, respecting claims of those which were still pending for decision. Section 4 of this Regulation says that despite the decision of the Judges a slave may claim to be a free person. Thus we see that gradually every attempt was made by the British Government to emancipate the slaves.

1. Legislative Enactment, Vol. I, 1796-1883, p.91 at p.114.
2. Vol. I, 207.
3. Ceylon Legislative Enactments, Vol. I, 1883 Edition, p.209.
4. Section 2 of Regulation 8 of 1821. Vol. I, 1883 Enactment, p.68.
5. See Section 3 of Regulation 8 of 1821.
6. Vol. I, 1883 Enactment, p.299.

1. Ceylon Legislative Enactments, Vol. 1, 1796-1883, 1883 Edition 4.
2. 1796-1883, Vol. I, Enact., p.107.

It will be interesting to consider the effect of these and various legislative measures after nearly half a century of British occupation. Mr. Colebrook was appointed to report on the institutions of those country to His Majesty's Government. In his report, which was published in 1831, he says,¹ "Slaves in the Malabar districts were first registered in 1806, and in 1818 provision was made for annulling all joint ownership in slaves, and for enabling all slaves to redeem their freedom by purchase. Before slavery was finally abolished, a Regulation was passed in 1821 for the emancipation of all female slave children by purchasing them at birth and freeing them: the Government engaging to pay their owners two or three *Rix* dollars according to the caste of the mother. The number of children who have been registered as free by the subscribers to the address to the Prince Regent in 1816 is 96, *i.e.* 50 male and 46 female children. The number of female children who in 1829 had been purchased by Government under Regulation of 1821 was 2,211; and the number of slaves who had purchased their freedom under the Regulation of 1818 either by labour or public works or otherwise was 504, *i.e.* males 200, females 171, and children 133.

By the provisions of the law the value of the slave is determined by arbitrators; and it may be objected to the Regulation of 1821 that the Government should have fixed the sum to be paid for each female child with reference to caste, and at so low a rate as three *Rix* dollars (or 4s. 6d.) for the highest; which sum the owner was bound to accept. It would be more just that, as in the case of adult slaves purchasing their freedom, arbitrators should be appointed to determine the rate.

Latterly, the Malabar slaves have not come forward in any numbers to redeem their freedom by purchase but many children have been enfranchised under the regulations. These laws are objected to by the Malabar proprietors, who have complained of the compulsory manumission of these slaves; but as the gradual extinction of slavery in Ceylon may be accomplished with so little sacrifice, the regulations of 1818 and 1821, with some modifications should be maintained, and their operation extended to the Kandyan Provinces, where personal slavery to a limited extent also prevails."

Thus, we see that though an opportunity was given, perhaps due to economic reasons, the slaves in Jaffna did not avail themselves of the privi-

1. Ram. Rep. 1820-33, p.221.

leges conferred on them by law and a large number of them remained slaves. Voluntary manumission appears to have been practiced rarely in Jaffna, as a result there were a large number of slaves who remained bondsmen. Finally, by Regulation No. 20 of 1844, slavery was abolished.

Regulation 20 of 1844,¹ section I enacts "that slavery shall no longer exist in the Colony, and that all persons at such a time being slaves shall thereupon become free, and entitled in every way to all the rights and privileges of free people, any other law or Ordinance to the contrary now in force notwithstanding." Section 3 repeals all laws and Ordinance tolerating slavery.

Though slavery was abolished legally many of the depressed classes remained as *de facto* slaves of their masters for economical reasons. In spite of the fact that slavery was abolished in 1844 it is surprising to find that arguments have been advanced in cases on the footing that it existed long after 1844. It is sufficient to give a criminal and a civil case to illustrate this. In *Queen v. Ambalavanar*,² a man of one caste wished to bury his wife according to certain ceremonies which the neighbours of a different caste thought were only applicable to them. These neighbours assembled together so as to form an unlawful assembly. They were convicted of the charges of unlawful assembly, and they appealed. The late Sir Ponnambalam Ramanathan contended in appeal that the accused had the right to act in the way they did, in view of section 8 of Regulation No. 18 of 1806. It was not brought to the notice of the Court that this Regulation had been repealed by Regulation 20 of 1844. His Lordship Burnside C.J., assuming that the Regulation of 1806 was still in force, said:³ "In the present, it might be sufficient to ask what does this mean? Does it really mean that by the laws of this country one of Her Majesty's subjects could be prevented from honouring the dead in a particular way; because some other persons or body of people said they had the exclusive privilege of doing so? But suppose it is conceded that is the law, and that the Supreme Court should be moved for a writ of injunction to prevent a woman from being carried to the grave to the sound of tom-tom, does it follow that a body of men may assemble themselves together, and by show of force and to the terror of the other subjects of the Queen enforce their own edict to that

1. Cap. 62, the Abolition of Slavery Ordinance.

2. 1 S.C.R. 271

3. 1 S.C.R. 271 at 273.

effect against the party who favoured the tom-tom. I apprehend not. I say it with diffidence in the face of the learned Counsel's contention. I trust that none of the ancient rights of the Malabar inhabitants of Jaffnapatam will be jeopardised. Notwithstanding the contention and the venerable authority on which it is based, I make bold to hold that the Malabar inhabitants of the Province of Jaffnapatam, whoever they may be must one and all be subject to the universal proposition of law applicable to the whole Colony, that the people cannot take the law into their own hands, and seek to administer it after the fashion of Judge Lynch."

In *Kanthappar v. Kanthappan et al*,¹ the plaintiff sued the defendants as his service tenants and not as tenants at will and failed to prove service. The defendant claimed the property adversely to the plaintiff. The lower Court Judge held that the plaintiff had failed to prove service and the defendants had prescribed to the land. The judgment was affirmed by the Supreme Court and the Solicitor-General, the late Sir P.Ramanathan, moved under Section 52 of the Courts Ordinance to have the case reserved for a Fuller Court. A petition also was addressed by Tamil gentlemen of standing to Lawrie, J.

The learned Judge, in delivering judgement affirming the decision, says:² "Since 1844 the Kovias have not been slaves, they became free men-in many cases they did not break the old ties-they preferred to render services and to work for the families of the former masters rather than quit the homesteads in which they and their ancestors had lived from time immemorial. Such, I think, was the position of these defendants' ancestors towards goodwill, or on contract, express or implied. The legal rights of Kovias as to the acquisition of land by long possession were the same as the rights of Vellalas. These rights were regulated by Ordinance."

1. 1899, 2 Thamb. Rep. 74/82

2. 2. Thamb. Rep. 77/85.

CHAPTER VI

CASTE SYSTEM IN JAFFNA

In the previous chapter we dealt with the institution of slavery and caste are not identical institutions, neither are they mutually exclusive. They indeed form intersecting circles. The caste system in Jaffna is a vital institution. The *Vellalas*, the landed gentry of Jaffna, had their *adimaïs* (slaves) and *kudimakkal* (person who were not slaves but who performed customary services to the Vellalas). Caste impinges in various ways on questions not only of race and religion but of economics, law and the customs of the people. Many institutions and customs will not be understood by foreign readers unless they understand the social structure of Jaffna. Hence, an attempt is made to discuss briefly some of the important castes in Jaffna.

THE ORIGIN OF CASTE SYSTEM

Hutton¹ says: "Roughly speaking, there may said to be five important theories of the origin of caste apart from the minor variations and combinations of these five; there is first the traditional view of the origin of caste typified in the Code of Manu; there is the occupational explanation of which Nesfield was the best known exponent; the tribal and religious explanation of Ibbetson; the family or gentile explanation offered by Senart and the racial hypogamous explanation of Risely. Most of these explanations are not at all satisfactory by themselves, though all contain a definite appreciation of what would perhaps be rather described as factors, than causes of the caste system. The nearest approach to a satisfactory explanation is probably to be found in the Asiatic Review in 1929 by Mr. Stanley Rice, who postulated that 'the caste system was pre-Aryan in origin.'"

According to the first view, caste is based on four varnas or colours sprung from different parts of the Creator's body and subject to certain prohi-

1. See Census Report of India, 1931, p. 433. See also Castes in India by Hutton

bitions as to marriage, food and occupation, breach of which has led to loss of position, while the enormous number of existing castes between which intermarriage and communality is banned, is accounted for by unions, licit and illicit, between one and another of these castes. Hypergamous marriages have given rise to clean castes, and marriages which we may describe as hypogamous, between a male of a lower position and female of a higher, stigmatised as *pratiloma*, that is, against the grain, have given rise to the outcastes who, though Hindu or at least quasi-Hindu by religion, fell outside the pale of decent Hindu society. Hutton says that the traditional view is based on a Rigveda hymn and is discarded by all modern critics.

Nesfield was the exponent of the second view. According to this view people who practiced a particular trade or calling, formed themselves into a guild which later developed into a caste. This theory, says Hutton,¹ "will hardly stand critical examination." This does not explain the varying position of agriculturists who are of a low caste in certain parts of Southern India but generally of respectable, if not, high caste in Northern India.

The third explanation of the caste system has been sought in a tribal origin. Ibbetson attributed the development of caste to a continuation of tribal origins, functional guilds and "a Levitical Religion," and he said that the greater stress is on the tribe. Hutton observes that these features have contributed to the growth of caste but cannot be regarded as causes.²

The fourth attempt to explain caste is to ascribe its origin to *gens* and family worship. This explanation cannot be accepted because the *gens* would appear to be essentially different to caste and corresponds to the *gothra*. A caste in India or in Ceylon does not claim the same ancestry and in the same caste there may be several *gens* or *gothras*.

The fifth explanation of caste is Risley's derivation from colour and hypogamy. In order to base caste on hypogamy, Risley has found it necessary to postulate a point of time at which the result of intermarriage provided enough women to enable a society to close its ranks and become a caste. This derivation, says Hutton, fails so explain satisfactorily the taboo on food and marriage. Further, many social factors that have tended to produce similar

1. Census Register, Vol. I, p. 434.

2. Census Report of India, 1931, p. 435.

results in regard to foreigners, such as the Moghuls or the English, have not succeeded in making Muslims or Anglo-Indian into a caste. Professor Dutt adopts Risley's views.¹

Hutton, in his quest for the origin of caste, examines some of the primitive societies which have hardly changed during the last thousand years. He examines the tribes in the unadministered area to the east of Naga Hills where each village is an independent political unit and there is very often to be seen a distribution by villages of certain occupations. Thus, some villages make pots but do not wear cloth, others weave and others again are occupied principally with works of blacksmiths. Hutton remarks that here one sees the occupational aspect of caste origin of which so much emphasis has been laid by Nasfield and Ibbetson. As frequently happens, there are upheavals in village parties. As a result of battle, vendetta, and sudden deaths, a part of the village community, usually an exogamous clan, is compelled to migrate to some other village. Thus a group of weaving families would be welcomed in a pot-making village which only obtained cloth by barter. The visitors are permitted to remain there but are not allowed to ply their ancestral craft. The underlying feeling being that the practice of the tabooed craft will affect the crops or fruits of the earth generally because it is an offence to the ancestral spirits who are regarded as the source of fruitification.²

For the existence of the communal taboo, Hutton examines the same Naga community. He states that certain foods are peculiar to certain exogamous clans and they are in many cases associated with clan ceremonial and it may be offered as one hypothesis that the presence of the strange craftsman practising their craft is condoned or rather rendered less dangerous by the prohibition of intimate relations with them. Hutton proceeds to show that the tolerance of certain primitive tribes to allow Christians to live outside the village fence as a separate community is proof of the spirit pervading among primitive tribes.

Hutton says: "The sentiments and belief therefore on which caste is based, presumably go back to the Totemistic proto-Austoloids and the Austro-Asiatic inhabitants of pre-Dravidian India and Dravidian-speaking strangers, bringing new crafts from the West. Hence, Hutton says that there would

1. See Risley's Origin and Growth of Caste in India, Calcutta, 1931.

2. Census Report of India, Vol. I, p. 436.

arise local taboos against certain crafts and persons, taboos tending to become tribal and to erect rigid division between communities.

Even in early Vedic literature different words appear for identical occupations. With culturally superior strangers hypergamy must almost be certain to arise and if there became a foreign priesthood with the ancient sciences of South East Asia, the belief in their magical powers would make them tabooed of all. Hutton in conclusion says "that when the Aryan invader came the caste system was already a recognised institution".

In this connection the position in Manu's Code of *pratiloma* castes may be considered. Hutton says that Manu's rules of precedence are derived in this respect from social conditions in which the union of a woman of the invading race with one of the indigenous race was necessarily anomalous. If the invaders were like the Indo-Europeans organised as a patrilineal society and if the indigenous race was matrilineal as the Dravidian settlers of Malabar Hill, the fruit of the union of a male invader and an indigenous female would have been recognised in either society under either the Makkathayam or the Marumakkattayam principle, whether the marriage was matrilocal or patrilocal; the issue of a female invader by an indigenous male would have no place in either. Since he could not claim kinship through his mother with his exogamous patrilineal clan or through his father with his matrilineal family, having no claim on family property under either system, his position would tend to become degraded which, according to Hutton, accounts for the low status in Manu's Code which was promulgated at a date when the precise causes of that low position were no longer clear and called for some sort of normal explanation.¹

Though, much may be said for Hutton's view regarding the origin of castes, it cannot be said that as a general proposition his view is a universal one. He examined one community and from it comes to a general conclusion. It is a well-known principle of reasoning that from one or two particular examples one cannot come to a general conclusion. The truth of the matter seems to be that no one can postulate a universal theory regarding the origin of caste. Like all sociological phenomena there must have been various factors at work in the development of a particular caste. Thus, in some places the conquering hordes create castes as is presumably the case of the

Nallavars and *Kovias* of Ceylon. In other places the occupational explanation of Nesfield may be true. With these observations we shall briefly consider some of the important castes among the Tamils of Jaffna.

CASTE SYSTEM IN DRAVIDIAN SOCIETY

The caste system in Jaffna is not based on the traditional divisions of castes among the Aryans. The Tamils of Jaffna had migrated to Jaffna long before the Aryan influence could be felt in their social structure. The division of caste in Jaffna roughly corresponds to the system that existed among the ancient Tamils. Kanagasabai, in his book entitled "The Tamils Eighteen Hundred Years Ago,"¹ says that among the ancient Tamils the division of caste into the four varnas, Brahmin, Kshatriya, Vaisya and Sudra never existed. The highest caste among the ancient Tamils were the Arivars, the sages. But the most influential caste among the ancient Tamils were the Vellalas.

According to Swamy Vedachalam it is the Aryan priests who adopted the device of bringing all Tamils under three denominations: Kshatriya, Vaisya and Sudra and formulated rigid rules. He says:² "In this design the Aryan priests succeeded so well, that the Tamils whether kings or nobles, rich or poor, learned or ignorant, all have become thorough slaves not only to Aryan priests but also to all who have joined the Aryan fold and bear the name of Brahmin. After this the further work of vilifying the Tamils was made much easier, and all those who in course of time, styled themselves Brahmins, discovered it to their great benefit and glory, to efface the three grades of distinction into which their predecessors classed the Tamils and to put them altogether under the general term 'Sudra,' which means but the contemptuous menials as a whole. But in the Tamil country nobody will call himself a Sudra or a Vaisya or a Kshatriya. The Tamils are either agriculturists or traders, artisans, or labourers; every class of people follows a hereditary profession and calls itself by the name of that profession. But quite recently, a kind of mania has afflicted some classes; the people whose professions, though much useful, are looked upon as low by Brahmins and their imitators, to bring themselves under the Aryan appellation of Brahmins, Kshatriya and Vaisya, escape being called the Sudra." It is into this error that even such an erudite scholar like Simon Casie Chetty falls when in his work entitled: 'The

1. Hutton Census Report of India, Volume 1, 1931, p. 438.

1. See "Ancient Jaffna" by Mudaliar C. Rasanayagam, pp.335,336.

2. See Memories of Thomas Van Rhee, p.97.

Castes, Customs, Manners and Literature of the Tamils,' he classifies the Vellalas under the Vaisya caste and even goes to the extent of calling the Vellalas 'The Poo Vasi Ya.'¹ The caste system in Jaffna as it exists today is ample proof of the theories advanced by Kanagasabai and Swamy Vedachalam."²

CASTE IN JAFFNA

Brahmins

The Brahmins who are few in number migrated to Jaffna during a more recent period. They are the temple priests and some of them held important positions in life. Originally in Jaffna Brahmins did not officiate in many temples. It was the Saiva Kurukkal who officiated. Even in modern times it is not the Brahmin but the Saiva Kurukkal who officiates in some of the temples in Jaffna. The Brahmins are exclusive in their habits and seldom marry outside their caste.

The Vellalas

The Vellalas are the great farmer caste of the Tamils and they are strongly represented in every Tamil country. The word "Vellala" is derived from *Vellanmai*,³ meaning cultivation or tillage.⁴ De Oppert considers "Vellalas" to be etymologically connected with Pallan, Palli, etc., the word meaning "Lord of the Valla or Pallas." The civilisation of the Vellalas seems to be an ancient one and dates back to pre-vedic times before the Aryan hordes poured into Dravidian country. The "Tholkappiam," the most ancient existing Tamil work, the age of which dates back to 3,500 B. C., shows that at a time when all the people, except those who lived along the equatorial regions, were leading the life of nomads or hunters, these Vellalas attained perfection in the art of agriculture, built towers and strong forts and had an organised form of Government.⁵ In the work entitled: "Tamil Eighteen Hundred Years Ago," Mr. V. Kanagasabai says:⁶ "Among the pure Tamils the most honoured were the Arivar or Sages. The Arivars were ascetics; but in society, the farmers occupied the highest position. They formed the nobility or the landed aristocracy of the country. They were called Vellalas, "Lords of the Flood," or "Lords of the Clouds," titles expressive of their skill in control-

1. "Vaiyapadal," edited by J.W. Arudpragasam (Tamil).
2. Madaipalli means kitchen attached to the Palace. Ancient Jaffna, p.389.
3. Memoris of Van Rhee, p.7.
4. See "Yalpana Vaipawa Kamuthy," p.37, by Velupillai.
5. Memories of Van Rhee, p.12.
6. Memories of Van Rhee, p.8.

ling floods and in storing water for agricultural purposes. The Chera and Pandyan Kings, and most of the Cholas of Tamil Akkam belonged to the tribe of Vellalas. The poor families of the Vellalas who owned small estates were generally spoken of as the *Veelkedi Uluvar* or "the fallen Vellalas," meaning thereby that the rest of the Vellalas were wealthy landowners. The Vellalas were called "Gangavamsa" or "Gangkula," because they are said to have derived their descent from the great and powerful tribe named Gangvide who inhabited the Valley of Ganges mentioned by Pliny and Ptolomy. The Vellala families in the Telegu country are called Velamas, in the Canarese country the Vellalas founded the Bellal dynasty and in the Tamil country they are called Vellalas.

The late Mr. Rajanayagam states that the Vellala families of Jaffna migrated from India somewhere about the 13th and 14th Centuries when the Chola and Pandya kingdoms had suffered disintegration and were hard-pressed by the Kalinga Kings.¹ This is only a conjecture and is not supported by any historical data. In Jaffna the Vellalas form a powerful land-owning caste. Even during the Dutch regime they exceeded any other caste in number.²

Madapallis

The Vaiyapadal says that Madapallis were immigrants and colonists.³ According to the researches of Mr. Rasanayagam the word "Madapalli" comes from *Madaipalli*. Mr. Rajanayagam says:⁴ "Perhaps on account of their royal origin, they considered themselves higher than the Vellalas." The Dutch Governor Van Rhee⁵, in describing the origin of Madapalli, says: "In heathen times they were employed to assist in the kitchens of the Brahmins." The writer of "Yalpana Vaipawa Kamuthy" states that the Madapallis had a local origin.⁶ Hence, we have conflicting theories regarding their origin.

1. See Ancient Jaffna by Mudliyar C. Rasanayagam, pp 335 and 336.
2. See Memories of Van Rhee, p.97.
3. "Vaiyapadal" edited by J.W. Arudpragasam,(Tamil)
4. Madaipalli means kitchen attached to the Palace. Ancient Jaffna, p.389
5. Memoirs of Van Rhee, p.7
6. See "Yalpana Vaipawa Kamuthy," p. 37, by Velupillai..

There appears to have been a long struggle between the Vellalas and the Madapallis for supremacy. The Dutch Governor, Van Rhee, writing in 1967, said:¹ "I think it necessary to state that a bitter and irreconcilable hatred exists between the people of the Ballala and of the Madapalli castes. It has, therefore, always been a rule in the Jaffnapatam not to elevate one above the other. For this reason the two *Cannecappals* or writers of Commandeur are taken from these two castes so that one may be a Ballala and the other a Madapalli.

Fisher Caste

The Karayars are the sea-faring people who settled down in Jaffna. According to the Dutch Governor Van Rhee they could be divided into six different castes,² viz., "the Carreas, the Mochas, the Paruwas, Chimbawas, Kaddeas and Timmalas," They correspond to the Karawas among the Sinhalese and presumably are from South India. Even today, the Karawas of Negombo and Chilaw speak Tamil as their home language. This fact points to their Tamil origin. The Karayars too owned slaves,³ and formed themselves into a close community.

Chiviars

The Chiviars are palanquin bearers. During the Dutch period they were required to bear the palanquins of the Commandeur and the Dissawe, and to provide their houses and castles with water.⁴ They form a powerful class in Jaffna occupying various positions in life.

The Potters

The Potter caste in Jaffna are called "Kusavars." They manufacture earthenware. During Dutch times they were under a duty to deliver pots which were made for the fortification works.⁵ They too owned slaves.⁶

The Washerman

The Washerman of the Vellala is called *Vannaan* and forms part of his *Kudimukkal*. Hence, his presence on ceremonial occasions is often stressed

1. Memoirs of Van Rhee, p.12
2. Memoirs of Van Rhee, p.8
3. See M. 271-272.
4. Memoirs of Van Rhee, p.9
5. See Van Rhee, p.9
6. Muthukrishna on Thesawalamai, pp.271-272

by the law of Thesawalamai.

The Barber

The Barber or "*Ambadan*" is also a *Kudimakan*. He has important functions to perform on ceremonial occasions.

The Kamallars

Among the five castes of artificers, are the blacksmiths, (*Kollar*); Carpenters, (*Tachtar*) and the Brasiers, (*Kannar*). There is a tradition that in ancient times they lived together in a fort built of loadstone at Mantai (Mantotte was near Mannar) and accumulated immense treasures by their respective trades. On account of their contemptuous behaviour, their huts were burnt to the ground through the instrumentality of a courtesan and they themselves were almost exterminated.¹ In modern times some of them carry on their respective trades but others hold positions in other walks of life.

The Kovias

The various theories regarding the origin of this caste have been already discussed. It is probable that they were the remnants of the Sinhalese who remained in the Tamil country after the Tamil conquest.² Today, in the social order, they are the domestic servants of the Vellalas but many of them have emancipated themselves and are known by the name of "*Iddampone Koviars*" (i.e. those Kovias who emancipated themselves) and hold important positions in life. It is clear that the Kovias did not come from India. Van Rhee describes the Kovias as slaves of inhabitants born here.³

The Tanakaras

The "*Tanakaras*" were the ancient elephant keepers who supplied the necessary fodder to the stables of the King. Perhaps, the word is derived from the Sinhalese word "*Tana*," which means *grass*. Mr. Rajanayagam says that

1. Vide The Works of Simon Casie Chetty - "Caste, Custom, Manners of the Tamils," p.41.
2. See Ancient Jaffna, p.383.
3. Van Rhee Mem., p.10.

they were Sinhalese who on account of the service rendered by them were not expelled from the country, and later became inseparably merged with the Tamils.¹ This caste, too, is peculiar to Jaffna and much is to be said in support of Mr. Rajanayagam's view.

The Nallavars

The Nallavars are the climber caste in Jaffna and peculiar to Jaffna. Mr. Rajanayagam says that the Nallavars were perhaps originally Sinhalese climbers and received the Tamil name on account of their peculiar way of climbing trees.² The "Vaipava Malai" says that the word "Nallavars" is derived from Nalluva, which means "to creep or climb."³ The compiler of the Thesawalamai Code says that the *Nalavas* always remained slaves. Even today they form the depressed classes of Jaffna and occupy a low rung in the social ladder. They have their own washermen called "Turumbas".

The Pallars

The Pallars were the only slaves who appear to have accompanied their masters from India and were employed in cultivating the fields of their lords.⁴ Thurston in his monumental work entitled, "Castes and Tribes of Southern India," describes them as a class of agricultural labourers found chiefly in Tanjore, Trinchinopoly, Madura and Tinnavelly.⁵ The name is said to be derived from *pallam*, a low ground as they were standing on low ground when the castes were formed. It is further suggested that the name may be connected with the wet cultivation at which they were experts and which is always carried on in low ground.⁶ The Manual of the Madura district (1868) describes them as "a very numerous but a most abject and despised race, little, if indeed at all, superior to the *Paraya*. Their principle occupation is ploughing the land of more fortunate Tamils and though normally free, they are usually slaves in almost every sense of the word, earning by the ceaseless sweat of the brow a bare handful of grain to stay the pangs of hunger, and a rag covers their nakedness." In Jaffna the *Pallars* cultivate their masters' fields

1. See Ancient Jaffna, p.383

2. Ancient Jaffna, p.383.

3. See "Vaipava Malai," p.35

4. Ancient Jaffna, p.383.

5. Thurston, "Tribes and Customs of Southern India," Vol. 6, p.472.

6. Thurston, Vol.6, p. 473.

and lands. Even today their status may be described in the words of the Manual of the Madura District.

The Parayas

The *Parayas* are the untouchables who came from India and settled down in Jaffna. At some period in the history of Jaffna there is evidence to show that they were forced to live in specified areas. Thus, the place "Paraicherry" was at one time solely occupied by them.

The late Bishop Caldwell derives the word "paraya" from "parai," meaning drum. The parayars often function as drummers at funerals, festivals and other ceremonial occasions. Hence, the conjecture of Bishop Caldwell is entitled to great weight. Mr. H. A. Stuart, however, questions this derivation.¹

In Jaffna the Parayas often function as drummers at funerals and festivals. Van Rhee in Memoirs divides the Parayas into *Kalicare Parias*² and *Kottoccare Parias*. The *Parayas* were never the slaves of the Vellalas but were their *kudimakkal*. Their social status is deplorable. Like the *Nallawas* and the *Pallas* they belong to the depressed classes and lead a humble existence. Some of them are in affluent circumstances and have taken to weaving.

The Turumbas

The Turumbas are the washermen of the Parayas and belong to the depressed classes.

We have discussed the important castes of Jaffna. There are several other minor castes³ which do not need any discussion from the sociological point of view. The caste system is a deeprooted institution and would die hard. It is only education and social uplift that will ameliorate the conditions of some of the depressed classes and it is hoped that some day this baneful system would disappear from Jaffna.

1. See Thurston, "Tribes and Customs of South India," Vol.6, p.77.

2. See Memories of Van Rhee, p.10.

3. See Van Rhee's Memoirs

CHAPTER VII

MARRIAGE

Marriage has been legally defined by Vander Linden as "the union of man and woman contracted for the purpose of procreating and rearing children and of sharing all good and bad fortune with each other until death."¹ In this chapter we do not intend to deal fully with this interesting definition, or with all the incidents of marriage. There are certain incidents peculiar to the law of Thesawalamai governing marriage and it is with this aspect that we are here concerned.

The law governing marriage is the general law of the land, namely the Roman-Dutch Law as received in this country, and modified by the Statute Law and the decisions of the Supreme Court. But a person who professes the Hindu religion is governed by customary law in some of the essentials of marriage. Persons governed by the Law of Thesawalamai, to whatever religious persuasion they may belong, are subject to special statutory provisions governing their rights to property. So far as marital rights and liabilities are concerned, the Matrimonial Rights and Inheritance Ordinance² and the Married Women's Property Ordinance³ have no application to those governed by the Thesawalamai. Special provision is made by the Jaffna Matrimonial Rights and Inheritance Ordinance,⁴ and Ordinance No. 57 of 1947 regarding matters pertaining to the rights and liabilities of spouses governed by the Thesawalamai. These statutory provisions are neither comprehensive nor complete, and in the absence of any provision in the Thesawalamai Code, it is the Roman-Dutch Law which governs the marital rights of such spouses.

1. V.D.L., 1,3,2.
2. Cap. 47.
3. Cap. 46.
4. Cap. 48. Ord. 1 of 1911.

We are confronted with a further difficulty in applying the Roman-Dutch Law to persons governed by the Thesawalamai. Community of property, as understood by Thesawalamai. Under the law of Thesawalamai the property of either spouse remained his or her separate property, excepting *thediathellam* (acquired property) in which alone community existed. Hence, in stating the Roman-Dutch Law on this subject, this important distinction must be borne in mind. In this chapter we shall deal with the essentials of marriage and the marital rights and liabilities of the spouses.

THE ESSENTIALS OF A VALID MARRIAGE

Consent of Parties

Under the early law, child marriage were frequent and hence consent, of the spouse was not regarded as essential. In modern law, marriage, being a contract giving rise to status, is governed by the fundamental rule governing all contracts—that there should be *consensus ad idem* between the parties to the marriage. Whatever might have been the law during the Portuguese era or the Dutch regime, consent of the spouse will now be essential to the constitution of a valid marriage. Hence, a marriage that takes place under the influence of fraud, force, or fear is voidable, but the subsequent voluntary cohabitation of the spouses when the fear or force no longer exists will give validity to the marriage.¹

Consent of the Parents

Under the old law of Thesawalamai a woman attained majority at thirteen and hence may marry after this age without the parents consent.² If the father was not alive the consent of the mother was necessary.³ The Age of Majority Ordinance⁴ fixed the age of majority at 21 for all persons. Section 3 enacts that nothing contained in this Ordinance should prevent a person from attaining majority at an earlier period by operation of law. Under the Roman-Dutch Law, if a person was married previously he or she attained

1. Censure Forensic 1:1:13:6:7: Walter Pereira, 215.
2. See *Sittar v. Nally and others*, Morgans Counderlag and Beling, p.301; *Mailvaganam v. Arumugam*, 1863-8 Ram. Rep., p.128.
3. Poodepulle V. Arumugam, (M.4216).
4. Cap. 53.

majority. The Age of Majority Ordinance applies to persons governed by the Thesawalamai and marriage confers majority on a person governed by Thesawalamai.

The Marriage Registration Ordinance¹ governs marriages in general in Ceylon. The preamble says that it is an Ordinance to amend the law relating to marriages other than the marriages of Kandyans or Muslims. Marriage is defined as any marriage except marriages contracted between persons professing Islam.² Tamils governed by the Thesawalamai are not excluded. Hence, by necessary implication the Ordinance applies to persons governed by Thesawalamai.

Under this Ordinance, if one of the parties to a marriage is a minor, the consent of the father is necessary.³ If the father is dead or under any legal disability or in parts beyond the Island and unable to make known his will, the consent of the mother must be obtained. If both the father and mother are dead, or under incapacity, the guardian appointed by the father can give the consent, otherwise, the District Court, within whose jurisdiction the parties reside, can grant the consent on a proper application made to it.⁴ Such consent is not necessary if the party is a widow or widower or had previously married and the marriage has been dissolved.⁵

If the consent, as required by the Marriage Registration Ordinance, has not been obtained, is the marriage a nullify or is the marriage valid subject to penalties that may be imposed on the guilty spouse? This aspect was considered in the case of *Selvaratnam v. Anandavelu*.⁶ In this case the question was whether a customary marriage of a minor, who was governed by the Thesawalamai, was valid when the consent of the father had not been obtained. Kretser, J., after considering the provisions of the Roman-Dutch Law, the English Law, and those of the General Marriage Ordinance⁷ took the view that in such customary marriages, if the consent of the father is not ob-

1. Cap. 95.

2. Section 59, Cap.95.

3. Section 21, Cap.95.

4. Section 21.

5. Section 21 (2).

6. 1941, 42 N.L.R. 487.

7. Cap. 95.

tained the marriage is null and void, but Wijewardene, J., however, struck a dissentient note on this question and said:¹ "As regards the point of law argued before us, I share the doubts expressed by Driberg, J., in 202 P.C. Pt. Pedro 3994² whether the want of consent 'required' under Section 21 of Ordinance No. 19 of 1907 could be held to invalidate the marriage, according to Hindu rites, of a minor under 21 years, governed by the Thesawalamai, especially where the marriage had been consummated." But the Court held that the marriage was null and void, on the ground that most of the rites and ceremonies performed at Hindu marriages were not observed in this case.

It is submitted that the view of Kretser, J., has to be closely examined in view of the provisions of Section 43 of the General Marriage Ordinance which does not say that such a marriage is null and void. If the consent of the parent was not obtained, then on proper application either by the parent or the Attorney-General, the Court may order and direct that all estate and interest accruing to the offending spouse as the result of such marriage should be perfected and secured in favour of the innocent party. It is significant to note that if there is a contravention of this section the marriage is not declared null and void. Where the parties contravene certain other provisions of the General Marriage Ordinance³ the marriages of such parties are specifically declared null and void.⁴ It is submitted that by necessary implication, if the consent of the parent has not been obtained, the marriage is only penalised but is not declared null and void.

It is also regrettable that the decision in *Thiagaraja v. Kurukka*⁵ was neither cited nor considered in the case of *Selvaratnam v. Anandavelu*.⁶ In that case, Schneider, J., said: "The recognition of customary marriages is a recognition only of the customs as to the mode of solemnisation and nothing else. The Marriage Ordinance must be regarded as applicable to all marriages in regard to all other matters about which it contains express provisions. The provisions of the Ordinance as to the prohibited age of marriage (section 16), prohibited degrees of relationship (section 17), incest (section 18), remarriage (section 19), dissolution of marriage (section 20), suits to compel marriage

1. 42 N.L.R. 494.

2. S.C. Minutes, April 5, 1936.

3. Section 42 of Cap. 95.

4. See Sections 15, 17 of Cap.95.

5. 1923, 25 N.L.R. 89.

6. 42 N.L.R. 487.

(section 21), legitimation by subsequent marriage (section 22), to consent to marriage of a minor (section 23), are applicable to all marriages however solemnised. In view of this observation, the view of Wijewardene, J., appears to be the correct one. In *Ratnamma v. Rasiah*,¹ Dias, J., took the view that want of consent of the father of a minor who contracts a Hindu customary marriage does not invalidate the marriage. It is submitted that the law on this matter should be settled by an authoritative decision of the Divisional Court.

Parties must not Marry within Prohibited Degrees

Under the Thesawalamai Code, though there is no express provision enumerating persons among whom intermarriage is prohibited, yet it is cryptically stated that persons who wished to marry should not be related by blood than brothers' and sisters' children."² Thus, by implication, all marriages between ascendants and descendants were prohibited and all persons related within the fourth degree, excepting cross-cousins were prohibited from marrying each other. Thus, uncles and nieces could not marry and two brothers' children and two sisters' children could not marry. This rule of exogamy was practised among the Tamils of Jaffna. The Marriage Registration Ordinance³ now governs the matter. Marriage between ascendants and descendants and collaterals up to the third degree is prohibited.⁴ Thus, under the present law, marriage between children of two sisters or two brothers is not illegal. If a person married within the prohibited degree the marriage is declared null and void and in addition the spouses may be punished for incest.⁵

Parties must be of Marriageable Age

Under the old Thesawalamai there was no particular age of marriage. There is evidence that child marriages were often encouraged. In the case of *Anandan Mariamuttu v. Wede Caildayan*⁶ Duncan, J., said: "The heads of the caste Paramandala Mudaliyar and Kamaro Komarokollasooria Mudaliyar being asked as to the minority and full age of a native girl, under the country law, they say that there is no particular clause about the age or

1. (1947), 48, N.L.R. 475.

2. *Vide* Thes. Code, 2:4

3. Cap. 95.

4. See Section 15 of Cap. 95.

5. Section 16, Cap. 95.

6. M. 609-610.

minority of the natives under the Malabar Code, because it is customary among them to marry out their daughters when they are very young, in which case the husbands, as guardians, are said to aid them." By Statute, the age at which a male could marry was fixed at fourteen and the age at which a female could marry was fixed at 10. Subsequently these ages were altered to 16 and 12 respectively.¹

Spouses must not be Married

In modern law spouses must not marry during the subsistence of a valid marriage. During the Dutch period there is intrinsic evidence to show that polygamy was practised. It is an institution known to the Hindus of India and therefore it is not surprising to find similar practices in Jaffna during the Dutch period. The Thesawalamai Code says: "Pagans consider as their lawful wife or *wives* those around whose neck they have bound the *tali* with the usual pagan ceremonies; and should they have more women, they considered them as concubines. If the *wives*, although they should be three or four in number, should all and each of them have a child or children, such children inherit, share and share alike the father's property; but the child or children by the concubines do not inherit anything."² The Thesawalamai Code deals with the incidents of marriage contracted between pagans who came from India and the inhabitants of Jaffna. Thus, it is clear that polygamy was recognised under the law of Thesawalamai and further the offspring of such marriages were recognised as legitimate children. But, on the other hand, the children of concubines did not inherit anything and were considered illegitimate children. In *King v. Perumal*³ the question was raised whether Tamils domiciled in Ceylon could contract bigamous marriages but the Court did not decide this point. By the General Marriage Ordinance⁴ only monogamy is recognised and under the Criminal Law of Ceylon a person who knowingly commits bigamy is guilty of an offence.⁵

The Necessary Ceremonies must be Performed

During the reign of the Tamil Kings the only form of marriage recognised among the Tamils was the marriage contracted according to Hindu rites. The Dutch appeared to have imposed their religion on the inhabitants

1. *Vide* Section - The Marriage Registration Ordinance.

2. Thes. Code, section 1, (18).

3. 14, N.L.R. 496 F.B. 1911.

4. Cap. 95.

5. *Vide* section 362 (b), of the Penal Code.

of Jaffna and considered customary marriages as heathen practices. During the Dutch period only marriages which were registered in the Dutch in the Church rolls were recognised as valid marriages¹ but subsequently even customary marriages according to Hindu rites were recognised. It is instructive in this connection to refer to the answers given by the Commissioners to certain questions referred by the Court in the case of *Walliamma v. Maylwaganam*.² In dealing with customary marriages the Commissioners said:³ "It is, we think, necessary to explain how a marriage is considered duly registered; during the Government of this Island by the Dutch East India Company previous to 1795 all such marriages of the *Gentoos* of Jaffna whose names stand registered in the Church Rolls and whose marriages were not solemnised by the Protestant Padres, were looked upon as being in concubinage, and neither such concubines, nor their children ever inherited the estate of their nominal father, but afterwards those which were celebrated by the *Gentoos* (Hindu) priests were held valid."

Marriages performed according to Hindu rites have been recognised under the British regime:⁴ as to what particular ceremonies are essential for contracting a valid marriage no rule of law can be laid down. One has to look into the customary usages of the particular community concerned.⁵ Nevertheless, we propose to give in brief some of the important ceremonies practiced among the various castes.

Ceremonies among the Vellallas

It is usual among the Vellallas to call a Brahmin priest who performs the marriage ceremony by kindling a fire called *omesandy*. A necklace called '*tali*' is tied to the neck of the bride and a piece of cloth called the *kurai* is given by the bridegroom to the bride. These ceremonies are performed in the presence of the relations, barber and the washerman.⁶ Sometimes the *omam* ceremony is dropped and the priest only performs the *Pillayar* ceremony and

1. M. 201,

2. M.16,

3. M., p. 18.

4. See Balasingham's Laws of Ceylon, Vol. II, Chap, XXVII, as regards the history of legislation regarding registration.

5. *Vide* Case No. 6592, *Caderan Careem v. Mayly*, M. 185.

6. See Report of the Commissioners regarding the marriage ceremonies of the Vellallas - *Nelaguno v. Nelagunden*, M. 180 at 190.

a *tali* is tied and *kurai* is given.¹ The *tali* ceremony is considered important.² Where the parties are too poor to afford a gold necklace (*tali*) or even to obtain the services of a priest, then the relation, the washerman and the barber attend the wedding, a piece of cloth is given and the marriage is consummated.³ There is also evidence to show that in some Vellala families a priest is never called and marriage ceremonies are performed by themselves.

The usual Hindu marriages (customs and rites observed among the Vellallas) are described in graphic detail in an article by Mr. Arumugam in the Ceylon Antiquary and Literary Register. He says:⁴ "On an auspicious day alone a *Muruku* tree decorated with mango leaves, cloth, and jewels called *Kannikal* or virgin post is erected in the North-East corner with certain ceremonies by an elderly relative, who is not a widower. On the same day gold for the *tali* is melted by a goldsmith whom he brings to his house for that purpose. The pole is besmeared with pulverised sandalwood, and turmeric and the top is decorated with mango leaves.

On the day fixed for the wedding the bridegroom sends his present called *parisam* to the bride. Sometimes before the hour fixed for the ceremony the bridegroom at his home and the bride at hers are bathed to the accompaniment of native music and the chanting by dhobis and barbers of blessings. Milk is poured and *aruku* grass placed on the head of each before they are escorted to the well at which each is to be bathed. They are taken home after the bath and dressed and adorned for the occasion.

The bridegroom is taken in procession walking, driving or in a *thandikai* (palanquin). He is accompanied by a bestman and is followed by a servant woman carrying the *tali* and cloth (*kurai*) for the bride in a box on her head. Men precede him and women follow him. On the road dhobis assisted by barbers sing blessings. The dhobis spread a cloth for him to walk on.

In front are musicians. Wherever he walks the female inmates are mustered at the door to greet him armed with a water pot (*Nirakudam*)

1. M.190.

2. See *Teywane v. Candei*, M. 211.

3. M.190.

4. The Ceylon Antiquary Literary Register, Vol. II, Part IV, p.239. at 241.

trimmed at its mouth with mango leaves and surmounted by a coconut as well as with a brass plate (*taddam*)(*alatti*) containing saffron water and lighted with stick in a bowl of boiled rice. The bridegroom halts; one of the women salutes him by raising and lowering the *alatti* three times from right to left, the light is then extinguished by being immersed in the saffron water. This ceremony is called the *alatti*. She spreads a little of the water over him and with her right forefinger makes a mark (*poddu*) on his forehead. He then resumes his procession. At the gate of the bride's home he is received by women with a *nirakuddam*, a full water pot decorated as stated earlier and then the *alatti* ceremony is performed often by a dancing girl. The younger brother of the bride washes the feet of the bridegroom and is presented with a ring. The bridegroom is then ushered into the pandal and is seated under a canopy at the western end of the pandal facing the east. The sacred fire has been made previously in front of him and the priest seats himself on the right of the bridegroom in a line with the sacred fire facing it and into it he keeps on throwing small twigs of the mango tree and ghee and recites Sanskrit hymns. The bride's parents (father) seat themselves on a small heap of paddy between the bridegroom and the priest. On the left of the bride and opposite to the priest are two water pots, one representing Ganesa and the other containing holy water. Behind the water pots that symbolise the hermit and his wife is the grindstone representing respectively the hermit Vasiddur and his faithful *paraya* wife *Aruntuti*.¹ Behind the water pots that symbolise the hermit and his wife is the grindstone representing Akilikai.² Further back two water pots serve for Siva and his wife. At the back, in the centre four full water pots and four lighted lamps are arraigned round a pot called *arasani* which is decorated with cloth, flowers and jewels.

1. According to Hindu mythology Arunthuthi is the faithful wife of the righteous hermit Vasiddur and for their exemplary character and conduct they were elevated to the heavens and are now represented by the twin stars Pollux and Castor
2. According to Hindu mythology Akilikai was the wife of the sage Tamnvasa. One day she went out before dawn to fetch water and Indra in the form of a cat, followed her with a view to seduce her. Tamnvasa came to know of this and cursed Indra for his immoral conduct and cursed his wife for having gone without his permission. She was transformed into a rock

The diagram below may help the reader:-
Relations.....

F. G. H. Guests	A = Bridegroom
B. E. 0 + 0	B = Bride
C. + + I.	C = Sacrificial fire
D. 0 + 0 Passage	D = Priest
A. K.	E = Ganesa and Holywater
Guests	F = Vasiddur and wife
Relations	G = Grindstone - Akilikai
	H = Siva and wife
	I = Lighted lamps and water pots

Everything being ready the bride's parents wash the feet of the bridegroom and do reverence to him with camphor lights. Then, they take the right hand of the bride and offer it to the bridegroom with betel leaves, arecanut and gold coins. This is called *kannikathanam* (gift of a virgin). The bridegroom accepts these with both his hands. The priest then joins the hands of both reciting Vedic hymns accompanied by music and ringing of bells. Meanwhile on a silver plate the *tali*, *kurai* cloth and garlands are taken around to receive the benediction of the people. They as well as the priest bless the same by touching them with both hands. After exchanging garlands with her, the bridegroom hands the *kurai* to the bride. She takes it to her room and comes out dressed in it. then the bridegroom ties the *tali* round her neck to the accompaniment of music. This is called the *tali* ceremony. Then the ceremony known as *poothathalam* is gone through. A piece of cloth is tied in front of the bride and bridegroom. The bride offers to the bridegroom milk and plantains. He sips a little from the cup and returns it to the bride who sips a little. After this they publicly stand before the sacred fire as man and wife and receive roasted rice (*pori*) from the priest and bringing their hands together they shower the same on the blazing fire. After this the bridegroom takes the bride's hand and leads her thrice round the sacred fire and they do reverence to the water pots representing Vasiddur and his wife Aruntuti. By way of contrast the bride spurns with her left foot the grinding stone that represents the disobedient Akilikai. Blessings and congratulations follow. On the day the wedded pair offer rice, vegetables, cloth, etc., to the Brahmins who shower on them saffroned rice from a plate held between them. Elderly relations and friends bless them by putting first on the head of the bridegroom and then on

that of the bride *aruku* grass and rice. Two women come and prepare the *alatti* and the bridegroom and bride are led to the bride's room where she serves him with rice of which he partakes.¹ She too shares the meal. The bridegroom is then conducted to the wedding hall where he meets her relations. The males are fed first, then the females. After them the carters, dhobies and barbers are fed."²

This is an accurate account of marriage ceremonies that are performed among the Vellalas of Jaffna. This ceremony differs a little from that performed in India. In India the performance of the *oman*, the *panigrahana* or taking hold of the bride's hand and going round the fire with Vedic mantras, the treading of the stone and the seven steps or *sathapadi* are considered to be the most important rites.³ The marriage becomes complete and irrevocable on the completion of the *Sthapadi* or ceremony on the seven steps.⁴ But if it is shown that by the custom of the caste or district any other form is considered as constituting a marriage, then the adoption of that form, with the intention of thereby completing the marriage union is sufficient.⁵ In Jaffna the *Sapthapadi* ceremony is not often performed.

The Ceremonies among the Kovias

In early times the nuptial ceremonies performed by the Kovias are described in the case of *Nagy v. Codi*.⁶ The bridegroom wearing a pair of gold ear-rings is accompanied by his relations and friends to the bride's place. A dowry deed is executed and rice is served by the bride to the bridegroom. The Pilliyar (Ganesha) is made out of cowdung and the Pilliyar ceremony is performed. With lighted camphor the bride and bridegroom make supplication. The Vellalas, who own them, and the washerman and barber attend the wedding.

In modern times, parties go through this form of ceremony but if they

1. This ceremony is known as poothakalam.

2. See also Balasingham's Laws of Ceylon, Vol.II, pp.454-458.

3. Manu VIII, 227. (*Verekatacharyate v. Ramgacharyula*, 1891, 14 Mad. 316, 319; *Chanital v. Surajram*, 1909, 33 Bombay, 433; *Balli Appanne v. Subanal* 1938, A.I.R. Rang., III.

4. Mayne's Hindu Law, 10th ed., p.172.

5. Mayne, p.172.

6. Case No. 1103, M.191.

are in affluent circumstances they go through more elaborate rituals.

Marriage Ceremonies among the Chandars

Marriage ceremony among the Chandars is described in the case of *Velaythan v. Rajram*.¹ No Brahmin officiates in such marriages but the usual customary ceremonies are gone through. The bridegroom gives a cloth (*kurai*) and rice is served by the bride to the bridegroom. The relations also partake in the meal and a dowry deed is often executed.

Marriage Ceremonies among the Nallavars and Pallars

Among the Nallavars and Pallars, who are supposed to belong to the lowest rung of society, the marriage ceremony is simple. The husband offers a cloth as a gift and the bride serves the bridegroom with rice and parties live as husband and wife.² In an unreported case³ the Supreme Court had occasion to consider the validity of Nallava marriage. The applicant stated that she was married to the defendant according to customary Hindu rites in November, 1938. She said:-

- a) that the defendant was conducted to his place on the wedding day by her male relations;
- b) that the parents are brother and that the defendant's parents, brothers and sisters were present at the marriage ceremony;
- c) that the defendant presented to her *kurai* or wedding apparel;
- d) that a Pilliyar Pooja was performed after the brass pot with water and coconut were installed;
- e) that a dhoby attended the ceremony;
- f) that the marriage was consummated.

His Lordship, Justice Wijewardene, in delivering judgement, said: "The only point of law that has to be considered is whether the evidence of the applicant establishes a valid marriage according to custom. It is a well-known fact that the Hindu marriage ceremonies vary in different places and among different castes; while the most elaborate ceremonies as laid down in

1. Case No. 2260, M. 195.

2. *Sidambre v. Perial Peruman* - Case No. 1164, M. 187.

3. S.C. 503, M.C. Pt. Pedro, 494, delivered on 21st October 1942.

the *sastras* may be observed by Hindus belonging to one caste, the ceremonies as observed by people of some other caste, as for example the Nallavas are of a much simpler character. I am of opinion that the ceremonies referred to by the applicant were quite sufficient to constitute a valid marriage between the applicant and the defendant.

Essentials of a Valid Customary Marriage is a Question of Fact

The customary marriage ceremonies among the richer classes were described in the Ceylon Antiquary Literary Register.¹ The same ceremonies are performed even today with slight variations.

Except when a young couple contract love marriages, matrimonial alliances are arranged by the parents or relations. Steeped in the belief of astrology the birth charts of the young proposed couples are gone through with meticulous care by astrologers. If there is planetary agreement suitable for a marriage to be arranged then an auspicious day is fixed for melting of gold to make the necklace (*thaly*) which is tied round the neck of the bride by the bridegroom at the nuptial ceremony.

Thereafter an auspicious day is fixed for the solemnisation of the marriage. Arumugam says: "On an auspicious day alone a Murruky tree decorated with mango leaves cloth and jewels called *Kannikal* or virgin post is erected in the North-East corner with certain ceremonies by an elderly relative who is not a widower. On the same day gold for the *thali* is melted by a goldsmith whom he brings to his house for that purpose, the pole is besmeared with pulverized sandalwood, and turmeric and the top is decorated with mango leaves.

On the day fixed for the wedding the bridegroom sends this present called *parisam* to the bride. Sometimes before the hour fixed for the ceremony the bridegroom at his home and the bride at hers are bathed to the accompaniment of native music and the chanting by *dhobies* and barbers of blessings. Milk is poured and *aruku* grass placed on the head of each before they are escorted to the well at which each is to be bathed. They are taken home after the bath and dressed for the occasion.

1. Vol. II Part IV p. 239.

The bridegroom is taken in procession walking, driving or in the *thandikai* (planquin).

Among the Tamils, besides these four castes, there are various other castes and one cannot state with certainty the exact ceremonies gone through in celebrating marriages. Each case will depend on its own facts. Thus, the rites performed in celebrating a marriage vary with the status, wealth and customary usages of the people. It is interesting to note that the marriage ceremonies performed among the lower classes are purely Dravidian in origin and correspond to the ceremonies adopted in that form of marriage known as *Sambandan* among the Mukkuvars of Ceylon and Malabars of India.¹ The ceremonies performed among the Vellalas show that certain Aryan ceremonies have been adopted by the Dravidians. In such marriages we have a happy combination of both the Aryan and the Dravidian rites. When we consider the Hindu form of ceremony prevalent among the Tamils of North Ceylon we see how true the words of Professor Vinogradoff are. Vinogradoff, after referring to the Brahmin Vavaha, says:²

"It may be added that the solemn ritual of the kind of marriage, spread to other forms, so that now the Brahmin ceremonies are generally used in a ceremonial marriage, no matter what the castes of the bride and bridegroom are."³

Often Courts have to decide whether a valid customary marriage has been celebrated. In deciding this question it is almost impossible to decide from authorities or decided cases the essential ceremonies that must be performed.⁴ Each case will depend on its own facts. All that the Courts have to ascertain is whether a marriage was intended.⁵ Where it is proved that a marriage was performed in fact, the Court will presume that it is valid in law and that all essential rules were observed⁶ and that the necessary ceremonies have been performed.⁷

Where a ceremony has been proved it is incumbent on the person

1. Gour's Hindu Code, 2nd Edition, p. 265.
2. Vinogradoff - Historical Jurisprudence, Vol. I, p. 242.
3. *Re the Aryan rites adopted* see Vinogradoff, p. 236 ff.
4. Balasingham Laws of Ceylon, Vol. II, p. 446.
5. 50 N.L.R. 135, S.C. 349 of 1948 D.C. Pt. Pedro, 2684.
6. *Iakigande v. Gange*, 1898, 22 Bom. 277-9.
7. *Morji Lal v. Mouki Lal Chandrabooti*, 1911, 38, Cal. 700, 381 (a) 122, P.C.
8. *King v. Perumal*, 1911, 14, N.L.R. 496, F.B.

who denies such a marriage to prove that some essential detail in the ceremony has not been performed.⁸ If the law was otherwise, it would be open to a person to prove that some minor detail has been left out and thus avoid a marriage which has been solemnly entered into and adopted by the parties. There are certain ceremonies which are regarded as essential in a Hindu customary marriage. Thus the tying of a *tali* is an essential ceremony among the Vellalas. It is not necessary that the *tali* must be made of gold. It is sufficient if a symbolic *tali*, such as a piece of turmeric is used.¹

Chiefly through the efforts of Sir Alexander Johnstone, slavery was abolished in Ceylon in 1844. Closely linked with slavery is the institution of caste. There were many customs in the Thesawalamai to regulate the relations between the various castes.² But it is not necessary to deal with these matters in view of the fact that the caste system has no legal consequences today.

The Tamil Customary Laws regulate the customary form of marriage. For a valid marriage, under the Thesawalamai, there should be :

- a) the consent of the parents, or, if the parents are dead of their guardians;
- b) the attainment of the age of maturity;
- c) the requirement that the bride and bridegroom should be of the same caste;
- d) the necessary ceremonies.

The General Marriage Ordinance which regulates (a) and (b) contains no prohibition against inter-caste marriages.

So far as the ceremonies are concerned, the statute is silent, and customary marriages among the Hindu Tamils are still recognized.⁶⁵ Strict monogamy is now enforced by this statute.

Marriage is as much a sacred institution among the Tamils as in the Aryan Society. In the time of Manu, marriage was an institution of great fluidity. "The celebrated eight forms of marriage" says Dr. J. D. M. Derrett³ was

1. *Ratnamma v. Rasiah*, 1947, 48 N.L.R. 475.
2. For description of the Tamil caste systems see caste system in Jaffna - Laws and customs of the Tamils of Jaffna by H.W. Tambiah
3. See *Thiagarajah v. Kurukal*, (1923) 25 N.L.R. 89.

an attempt to regulate different methods of contracting marriage, all of which were undoubtedly in use in ancient times, mostly among the pre-aryan inhabitants of India"

The formal type of marriage among the Tamils was simple and devoid of religious rite.¹ The same is true of Kandyan Marriages.² The ceremonies among the ancient Tamils varied, but in the main consisted of the tying of a necklace, called *tali*, by the bridegroom, the presentation of a cloth to the bride (*Kurai*). These ceremonies are performed in the presence of the relations, the barber, and the washerman and is followed by the giving of a feast.³ The Thesawalamai too recognised these ceremonies as sufficient. In modern times these rights are the only ones observed among the poorer class of Vellalas and the lower castes. In some marriages, Genesha, the God of Nuptials is invoked by a simple ceremony performed by the elders.

The ceremony consists of the planting of a piece of jusa grass in a ball of cowdung and invoking the blessings of this deity.⁴ Among the Vellalas, the ceremonies were the only ones observed at one time.⁵ In modern times elaborate ceremonies are very similar to those of the Malabars of the South West Coast of India. Sambandan is the term used even today to designate the matrimonial alliance in Jaffna. Sambandan is the formal marriage known to the Malabars of the South Western Coast of India. The more elaborate form, Vivaha practiced today is a more recent innovation by Brahminical priest craft.

Superimposed on these simple marriage customs described earlier are the Aryan rites performed when Vellalas of the richer and middle class marry.

Marriage by Habit and Repute

Under the law of Ceylon the fact that parties had lived as husband and wife and were received by relations and friends as husband and wife create a presumption of fact that there has been a valid marriage. It is one of

1. See History of South India by Nilakantha Sastri
2. vide Hayley on Kandyan Law, p. 174
3. See Laws and Customs of the Tamils of Ceylon by H.W. Tambiah for the marriage
4. vide The Laws and Customs of the Tamils of Jaffna by H.W. Tambiah, p. 107
5. See Report of the Commission regarding the Marriage Ceremonies. Muttukrishna on Thesawalamai, p. 180-190

the ways in which a customary marriage that took place several years ago could be proved. The best evidence that could be led to prove a customary marriage will be the testimony of those who were present at such a marriage and who will testify to the fact that after marriage the parties lived as husband and wife. If the only evidence available to prove marriage is the testimony of witnesses who state that the parties lived as husband and wife and were received by their relations and friends as such, only a presumption of valid marriage arises. It is open to the party who denies the marriage to show that in fact no marriage ceremony was gone through. Hence, is always prudent to lead evidence that the parties lived as husband and wife and were received as such by the relations.

The question whether the essential ceremonies of a marriage have been gone through is often a question of fact and the appellate Court will not lightly interfere with the finding of the lower Court on this point. The case of *Sinaval v. Nagappa*¹ requires consideration. In this case, evidence was led to prove that among the people belonging to the Nallava caste the bride and bridegroom had eaten rice and betel before their relations and that this ceremony was sufficient to constitute a marriage. The Magistrate has come to the conclusion on the evidence that valid marriage did not take place. In appeal Shaw, J., said: "The Maniyagar says that amongst people of the Nallava caste, the eating of rice and betel before the family is sufficient to constitute a valid Hindu marriage without the more formal ceremonies which are practised by persons of a higher class. The Magistrate has come to the conclusion on the evidence that the parties did not go through a ceremony of marriage and had, in fact, never lived together at all either as husband and wife or as man and mistress. I confess that I have felt some difficulty on the finding of fact. The evidence as recorded would appear to me to more strongly support the case for the applicant than that of the defendant, and were I deciding this case unbiased by the finding of the Magistrate and upon the recorded dispositions, I should probably find in favour of the applicant. But that is not sufficient to enable me to reverse the Magistrate's finding." His Lordship proceeded to state that as an appellate Judge he will not interfere with the finding of fact of the Magistrate who has seen and heard the witnesses. Perhaps had the parties lived as husband and wife the Magistrate might have come to a different view.

It is submitted with respect that the reasoning in this case cannot be

1. 6 B.N.C., p. 26.

supported. What the essential ceremonies of a valid marriage are is a mixed question of fact and of law. If the facts clearly show that there is no valid marriage, it is submitted with respect that there is no sanctity attached to a finding of fact by the lower Court Judge. The Supreme Court is in a position to decide the case as effectually as the Magistrate.

The presumption in favour of marriage by habit and repute has been held to apply among Tamils by the Privy Council. In the case of *Sastry Valaidar Aronegary v. Sembecutty Vaigalie*¹ the evidence showed that the parties lived together as husband and wife, betel and rice were served by the wife to the husband and on account of a row among the relations all the other necessary ceremonies were not performed. The District Judge held that there was a valid marriage but the Supreme Court said that the burden of proving that there was a valid customary marriage was on those who are relying on it and set aside the finding of the District Judge. The Privy Council reversed the finding of the Supreme Court and held that there was a valid marriage. Their Lordships said that according to the Law of Ceylon as in England, where a man and woman are proved to have lived as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage. Peacock, J., in delivering the judgment of the Board² said: "It was contended by Dr. Phillimore, Counsel for the Appellant, that the presumption of marriage arising from cohabitation with habit and repute did not apply to the case of the Tamils and to Ceylon but it appears from the authorities which he cited that according to the Roman-Dutch Law, there was a presumption in favour of marriage rather than of concubinage. It does not, therefore, appear to Their Lordships that the law of Ceylon is different from that which prevails in this country, namely that whereas a man and a woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in concubinage."³

For a valid customary marriage no notice of marriage contemplated by the General Marriage Ordinance need be given. In *Chellappa v.*

1. 1881, 2 N.L.R. 322.

2. 2 N.L.R. at 328.

3. 2 N.L.R. p.328.

4. 18 N.L.R. 435 at 436

*Kumaraswamy*¹ the question that had to be decided was whether two persons were married. The facts showed that the parties gave notice of marriage but did not later register the marriage. They went through the customary ceremonies: It was contended that unless the marriage was registered it was not a valid marriage. Ennis, J., dealing with this contention says: "His refusal to complete a marriage under the Marriage Ordinance did not affect the Hindu ceremony or his consent to that Counsel for the Appellants relied on *Vairamuttu's* case¹ where it was held that after notice of marriage under the Marriage Ordinance had been given there could be no subsequent valid marriage by Hindu custom. This case was decided on August 7th, 1885, on a consideration of the Marriage Ordinances of 1863 and 1865. In 1895 an Ordinance was enacted which declared (Section 15) that no marriage should be valid unless registered. The section contained a proviso exempting non-domiciled Hindus. This was repealed the following year by Ordinance No. 10 of 1896. All the Marriage Ordinances have since been consolidated in the Ordinance No. 19 of 1907, but Section 15 of the Ordinance No. 2 of 1895 has not been re-enacted. Since *Vairamuttu's* case², therefore, there has been a declaration by the legislature against the validity of unregistered marriages and later a definite repeal of that provision, and nowhere now is there any express provision declaring unregistered marriages invalid. In 1900, in the case of *Valliammai v. Annammai*, a Full Bench of the Supreme Court held that in Ceylon there can be lawful marriages without registration thereof under the local Ordinances, and in my opinion the decision in that case is ample authority for the learned District Judge's decision in this, and is consistent with the legislative intention which must be inferred from the definite repeal of the former prohibition."

CONSEQUENCES OF MARRIAGE

Once a valid marriage has been contracted there are certain legal consequences which naturally flow from the new status that has been created. The husband is under a legal obligation to support his wife. The common law on this subject has been swept away by the Maintenance Ordinance³ and it is to this statutory provision one must look in ascertaining the liability

1. 1885/7 S.C.C. 56

2. 1885/7 S.C.C. 56

3. Cap. 76

4. *Lamahamy v. Karunaratne*, 1921, 3 Law. Ree, 20, F.B. 22 N.L.R. 289.

of the husband to support his wife and not to the Roman-Dutch law.⁴ The Maintenance Ordinance applies to persons governed by the Law of Thesawalamai. A similar obligation was created by the Married Women's Property Ordinance¹ which enacts that if a married woman having separate property neglects or refuses to maintain her husband, who through illness or otherwise is unable to maintain himself, the Magistrate within whose jurisdiction such woman resides, may, upon application of the husband, make and enforce such order against her for the maintenance of her husband out of such property.² This provision has no application to Tamils of the Northern Province who are, or may become, subject to the Thesawalamai.³

There are various other incidents which the Common Law of the country recognises and it is not within the purview of this book to discuss such incidents. Only those incidents which are peculiar to the Thesawalamai are discussed. In this chapter we shall endeavour to show the rights and liabilities of the spouses so far as their proprietary relations are concerned.

The contractual and tortious liabilities of the spouses and the status of the wife to appear in a Court of law is also discussed. The difficulty of treating these subjects will be fully appreciated when we realise that the statutory provisions, namely the Matrimonial Rights and Inheritance Ordinance⁴ and the Married Women's Property Ordinance⁵ which swept away the Common Law on these matters have no application to Tamils governed by the Thesawalamai.⁶ There is a special statutory provision, namely, the Matrimonial Rights and Inheritance Ordinance (Jaffna) which applies to Tamils governed by the Thesawalamai. But this Ordinance only governs the matrimonial rights of spouses who were married after the 17th July, 1911 – the date on which this ordinance came into operation. This Ordinance is not a comprehensive one and does not deal with all situations which may arise between husband and wife. The Thesawalamai Code itself is silent on many matters and unless some principle could be deduced as a necessary corollary from well-established principles of the law of Thesawalamai, the Roman-Dutch law, which is the Common Law of this Island, will apply. In applying the Roman-Dutch Law it must be remembered that community of prop-

1. Cap. 46.

2. Section 26 of Married Women's Property Ordinance, Cap. 46.

3. Section 3 (2) of the Married Women's Property Ordinance.

4. Cap. 47.

5. Cap. 46.

6. See Section 3 of Chap. 46 and section 2 of Chapter 47.

erty (except in *thediatettam* property) is not recognised by the Thesawalamai and hence all those incidents coloured by this institution must be applied with caution. Different considerations will apply when we deal with *thediatettam* or acquired property. Here, too all the incidents of community of property have no application.

PROPRIETARY RELATIONS UNDER THE OLD THESAWALAMAI

Under the old law of Thesawalamai, property was divided into *mudusam*, hereditary property, brought by the husband; *chidenam* or dowry property brought by the wife and *thediatettam* or acquired property. The nature and distinction between these various kinds of properties are fully dealt with later. Each spouse was the owner of his or her separate property, whether it was *mudusam* or *chidenam*, but they were joint owners of its *thediatettam*.

Wife's Rights over Her Properties

Under the old Thesawalamai the dowry property of the wife and her *mudusam* were considered to be exclusively hers, yet she had no right to deal with it without the consent of the husband.¹ However, the widow had the right to sell her dowry property without of the consent of her children.² The wife, not being the owner of the *mudusam* property of the husband, had no power to sell the same. Even after his death the widow had no right to sell the husband's hereditary property.³ Since the husband was the manager of the acquired property (*thediatettam*), the wife had no right to sell even her portion of it during coverture, so long as the husband is living with her.⁴ The right of the wife to alienate her property without the consent of her husband was fully considered in *Chellappa v. Kumaraswamy*.⁵ In this case Sampayo, J., says: "So far as I know this is the first case in recent time in which it has been contended that under the law prevailing in Jaffna a married woman is competent to deal with her immovable property without the concurrence of the husband. The Thesawalamai, section 4, clause 1, which was cited on behalf of the plaintiffs, scarcely supports the contention, for it expressly says 'the

1. M 216.
2. Mootaver v. Periyar, M. 257.
3. N. Cadiragammai v. Sidamberam, M. 256.
4. Madar Santiago of Caremban v. Isabel, M.258
5. 18 N.L.R. 435.

wife, being subject to the will of the husband, may not give anything away without the consent of her husband.' Reference was also made at the argument to some passages in Muttukrishna's Thesawalamai, in which some old decisions of the local Courts are noted; but they are neither authoritative or consistent. The best of the decisions in Muttukrishna's Thesawalamai is that reported on page 269. It is a judgment of the Supreme Court, and there it was decided, on the authority of the Thesawalamai, section 4, clause 1, above referred to, that the wife's deed was in contravention of the husband's right, and could not be supported by the Tamil law. I think that the disability of a married woman is the same under the Tamil customary law as under the general law prevailing in the Island.¹ " This is perhaps one of the authoritative decisions which interpret clause 1 of section 4 of the Thesawalamai.²

This particular section of the Code only deals with donation but the reason given here would equally apply to all kinds of dealing with immovable property. Thus, it may be stated that the wife could not deal with her immovable property whether by sale, lease, mortgage or otherwise without the consent of her husband so long as he was living with her.

But if the husband is living separately from the wife and the wife is in indigent circumstances she could transfer her properties for purpose of obtaining maintenance without the consent and concurrence of her husband. In *Ramalingam v. Puthathai*³ it was held by the District Judge that a wife who is separated from her husband could sell her property for the purpose of procuring maintenance for herself. The Supreme Court affirmed the decision of the lower Court in appeal. In the course of the judgment Withers, J., says:⁴ "The circumstances of this case differentiates it from the case of *Silva v. Dissanaiké*, D.C. Tangalle, No.8 reported⁵ in , upon which the respondent's Counsel relied. I do not find that the Thesawalamai provides for a similar case."

The other case relied on for the respondent (Jaffna 598 *Ambalavaner v. Cander*, to be found in Muttukrishna's Thesawalamai at p.293) is too meagrely reported to be of any use.

1. 18 N.L.R. p.437.
2. See observations of Ennis, J., to the effect that this provision is not obsolete. 18 N.L.R. 436
3. 3 N.L.R. 347.
4. See 3 N.L.R. 348.
5. 2 C.L.R. 123

The Chapter in Muttukrishna's Thesawalamai, entitled "Gift or donation," is not in point. The rule given there is that the wife, being subject to the will of the husband, may not give anything away even out of her dowried property without her husband's consent, but from the context it appears that rule applies only when the husband and wife are living peaceably together. Besides, this document purports not to be gift of Viratari's dowries property, but an assignment for valuable consideration. The judgement is affirmed."

Husband's Right over the Property

The husband, being he manager of the community, has wide powers over the properties belonging to himself and to the community. He being the owner of the *mudusam* property had the power to mortgage or sell the same. he even had the power to sell his wife's dowried property with the consent and concurrence of the wife. Such a sale is binding on the wife and she is not permitted to resile from such a sale, because to do so would be to permit her to take advantage of her own fraud.¹

RIGHT OF SPOUSES GOVERNED BY THE JAFFNA MATRIMONIAL RIGHTS AND INHERITANCE ORDINANCE

The Matrimonial Rights and Inheritance Ordinance (Jaffna) came into operation on the 17th July, 1911. It regulates the matrimonial rights and status of spouses married after the 17th July, 1911.² The matrimonial rights and status of spouses married before this date are governed by the law applicable before the Ordinance came into operation.³ The Ordinance applies to all Tamils governed by the law of Thesawalamai.⁴

Section 6 of this Ordinance states: "any movable or immovable property to which any women married after the commencement of this Ordinance may be entitled at the time of her marriage, or except by way of *thediatettam*, as hereinafter defined, may become entitled during her marriage, shall, subject and without prejudice to the trusts of any will or settlement affecting, the same belong to the woman for her separate estate, and shall not be liable for

the debts of her engagement of her husband, unless incurred for or in respect of the cultivation, upkeep, repairs, management, or improvement of such property or for or in regard to any charges, rates or taxes imposed by law in respect thereof, and her receipts alone or the receipts of her duly authorised agent shall be a good discharge for the rents, issues and profits arising from or in respect of such property. Such women shall, subject and without prejudice to any such trusts aforesaid, have full power of disposing of and dealing with such property by any lawful act *inter vivos* without the consent of the husband in case of movables, or with his written consent in the case of immovables, but not otherwise or by last will without consent as if she were unmarried.

Under this Ordinance all property the wife gets, except *thediatettam*, belongs to her exclusively. She could alienate movables and by last will dispose of her movables and immovables without the consent of the husband and with the written consent of the husband, but not otherwise, she can deal with her immovable property by an act *inter vivos*. What happens where a wife, without such written consent, sells her property or deal with it by an act *inter vivos*? Similar words are contained in section 8 of the Matrimonial Rights and Inheritance Ordinance and our Courts have interpreted these provisions in a number of cases. In *Marie Cangany v. Karuppasamy Cangany*¹ the husband was presented at the execution of a mortgage bond by his wife and by his subsequent conduct recognised its validity. He was sued as administrator of her estate on the bond and he pleaded that the bond was invalid as it was executed without his written consent. A Divisional Court upheld this plea. Wood Renton, J., in construing the words "but not otherwise" said: "It appears to invest it with the character of a condition precedent, and in any event, it must be an express consent to the particular transaction. I do not think that an implication of the husband's consent from subsequent documents, in which he had recognised the existence of the mortgage, would satisfy the requirements of the law." In the case of *Ponnamal v. Pattaye*² a deed of conveyance by a married woman of immovable property was witnessed by the husband who signed as a witness by affixing a mark. A Divisional Court (Wood Renton, J., dissenting) took the view that the requirements of section 9 were satisfied and the consent in writing had been obtained. In *Valliamma v.*

1. Marshall's Judgments, p.223.

2. Section 5, Cap. 48.

3. Section 4, Cap.48.

4. Section 2, Cap.48.

1. 1906, 10 N.L.R. 79.

2. 1910, 13 N.L.R. 201

3. 1923, 24 N.L.R. 481.

*Lowe*³ the question whether subsequent ratification by the husband rendered a bond valid, where there was no written consent of the husband obtained at the time the bond was entered into, was considered. It was held that the mortgage of immovable property by a wife without the written consent of the husband cannot be regularised by the subsequent ratification of the husband. But the ratification renders the bond valid as a money bond. Garvin, J., with whom de Sampayo, J., agreed, followed the view expressed by Wood Renton, J., in *Marie Cangany v. Karuppaswamy*. Garvin, J., said: "As the loan transaction was governed by the Roman-Dutch Law subsequent ratification makes the loan transaction valid, though it may not be effectual as persons governed by the Matrimonial Rights and Inheritance Ordinance (Jaffna).

By section 8 of the Matrimonial Rights and Inheritance Ordinance (Jaffna) provision is made whereby the wife and deal with her immovable property after obtaining the consent of the District Court on a proper application by the wife. In the following cases the District Court may grant its consent:-

- (1) Where she is deserted by the husband;
- (2) Where she is separated from the husband by mutual consent;
- (3) Where he shall have been in prison under a sentence or order of any competent Court for a period exceeding two years;
- (4) Where the husband is a lunatic, or idiot or his place of abode is unknown;
- (5) When his consent is unreasonably withheld;
- (6) Where the interest of the wife and children of marriage require that such consent should be dispensed with.

If the husband and wife are separated *a mensa et thoro* by a decree of a competent Court, an application need not be made to obtain the consent of the Court and the wife can deal with her immovable property as if she is a *femme sole*.

By section II of the Ordinance (Cap. 48), the husband or wife may effect a policy of insurance on his or her own life or the life of his wife or her husband as the case may be, for his or her separate use: and the same and all benefits thereof, if expressed on the face of it to be so effected, shall ensure accordingly. Similarly, by section 12 (Cap.48) a policy of insurance effected before or after the commencement of this Ordinance by any married man on

his own life and expressed upon the face of it to be for the benefit of his wife or of his wife and children or any of them according to the interest so expressed and shall not, so long as any object of the trust remains, be subject to the control of the husband or his creditors or form part of his estate. It is further provided that if it is proved that the policy was effected and the premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum so secured an amount equal to the premium so paid.

Section 7 states: "Any movable or immovable property to which any husband married after the commencement of this Ordinance, may be entitled at the time of his marriage, or, except by way of *thediatettam*, may become entitled during his marriage shall, subject and without prejudice to any such trusts as afore-said, have full power of disposing of and dealing with such property...." Thus, we see the husband, subject to the terms of the trust, if any, becomes entitled absolutely to his property and could deal with it in any manner he likes.

CONTRACTUAL RIGHTS AND LIABILITIES

We have already dealt with the contractual rights of spouses to deal with properties belonging to them. Spouses governed by the law of Thesawalamai may otherwise bind themselves in contracts. It is this aspect which requires further consideration. Before the passing of the Married Woman's Property Ordinance and the Matrimonial Right and Inheritance Ordinance, the contractual rights of spouses in this respect were governed by the Roman-Dutch Law. The first of these statutory provisions considerably modified the rights of spouses. The Married Woman's Property Ordinance gave a married woman the status of a *femme sole*. Both these statutes have no application to Tamils governed by the law of Thesawalamai. Hence, even today, subject to the peculiar rules of Thesawalamai, Tamils to whom the Thesawalamai applies are governed by the Roman-Dutch Law on this matter subject of course to any statutory modifications brought about by the Jaffna Matrimonial Rights and Inheritance Ordinance or other legislation.

We shall consider the legal capacity of a married woman to enter into contracts and later consider how far her separate properties and the *thediatettam* property will be liable on her contracts. Under the Roman-Dutch

1. Grotius, 1: 5: 23: Vide 23: 2: 42,

Law the wife cannot, without the consent of the husband, render herself civilly liable by her contracts.¹ Contracts made without the husband's authority being void did not bind the wife or the husband. However, subsequent ratification by the husband will make the contract operative.¹ Though a wife's contract does not bind her she may confirm it, if she choose, after her husband's death and enforce it against the contracting party.² The wife's contracts are legally valid in the following cases:-

- (1) Husband and wife are rendered liable by the wife's contract though made without the husband's consent if it is solely to her benefit;³
- (2) Husband and wife are liable to the extent of enrichment;⁴
- (3) If the wife was a public trader she could bind herself and her husband if the contract is entered into in respect of the trade.⁵ *Menikularatbe v. Wickramanayake*⁶
- (4) The wife may bind herself and her husband by contracts incidental to the household as she was considered as the agent of her husband.⁷ But the husband will not be liable if there is a judicial decree of separation and if he notifies publicly that he will not be liable for her debts;⁸
- (5) If the husband has deserted his wife she may contract in her own name and bind herself;
- (6) By an ante-nuptial contract a woman may retain her contractual freedom.¹⁰

The principles of the Roman-Dutch Law, so far stated, would apply *mutatis mudandis* to persons governed by the Thesawalamai.

If the wife was bound by her contracts, her separate property would be liable for the payment of debts incurred by such contracts. We have seen that in certain contingencies she binds the husband and therefore in such cases the debt being that of the husband, his separate property can be at-

1. Voet, 23: 2: 42.
2. Voet, 23: 2: 42.
3. Voet, 23: 2: 43,
4. Grotius, 1: 5: 23, Voet, 23: 2: 43, Voet, 1: 3: 7,
5. Grotius, 1: 5: 23, Voet, 23: 2: 44; 1923.
6. 2, C.A.C. 168.
7. Voet, 23: 2: 46; Lalchand v. Saravanamuttu, 36 N.L.R. 273.
8. Grotius, 1: 5: 23, Voet, 23: 2: 44.
9. Voet, 5: 1: 16
10. Lee, p. 80.

tached for the payment of such debts provided that the husband is a party to the case. But where she alone is liable, the husband's separate property cannot be attached.

Different considerations would apply in the case of acquired or *thediatettam* property. As will be shown later, the whole of the *thediatettam* property will be made liable for contractual debts incurred by the husband alone during coverture. Applying the same principles for a postnuptial contractual debt incurred by the wife, if it has been incurred with the consent, whether express or implied of the husband, the whole of the *thediatettam* property should be made liable. In deriving this principle our Courts had recourse to the Roman-Dutch Law. In the case of *Kathiravello v. Minatchipillai*,¹ the husband granted a promissory note in 1886. The spouses were married in 1881. In May, 1890, the wife had obtained a divorce. In August, 1890, the grantee of the promissory note sued the husband, obtained judgment and seized the acquired properties. The wife claimed half of them and her claim was upheld. Thereupon the writ-holder brought an action under section 247 of the Civil Procedure Code for a declaration that the whole of the acquired property is liable to be seized and sold under the decree. The District Judge dismissed the writ-holder's action but the Supreme Court set aside this judgment and held that the whole of the acquired property was liable to be sold. Burnside, C.J., in the course of his judgment said: "I do not find that the Thesawalamai deals directly with the principle of the case. The principle that a man and wife are to be regarded as separate individuals with regard to property does not extend to acquired property during the existence of the marriage, with which the husband may deal and which he may dispose of at will and which is liable for the payment of debts during the marriage. It is no test of the liability of the property that the wife could not be sued for the debt jointly with her husband."

This principle was followed in *Avitchy Chettiar v. Rasamma*² by a Divisional Bench. The principle question considered by the Court is whether property bought out of money belonging to the wife is *thediatettam* property. It appears to have been assumed the whole of the *thediatettam* property is liable for the payment of a debt incurred by the husband. In *Avitchy Chettiar*'s case it is not clear whether it is a post-nuptial or ante-nuptial debt of the husband or whether it is a debt incurred on contract or on delict. This question was further considered by *Wijewardene, J.*, in *Swakeenpillai v. Murugupillai*.³ In

1. 2 C.L.R. 132
2. 1993, 35 N.L.R. 313.
3. 1940, 18 C.L.W. 49.

this case, the action was brought on a promissory not made by the husband during the subsistence of the marriage and the facts were similar to the case of *Kathiravello v. Minatchipillai* cited earlier with the distinction that the parties were governed by the Matrimonial Rights and Inheritance Ordinance (Jaffna). Wijewardene, J., following Avitchy Chettiar's case held that the whole of the *thediatettam* property was liable to be sold.

The authorities cited above only deal with post-nuptial contractual debts. The question may be asked whether the whole of the *thediatettam* is liable for the ante-nuptial contractual debts of the husband. If any parallel is to be drawn from the Roman-Dutch Law, this question must be answered in the affirmative. Under the Roman-Dutch Law the lawful liabilities of the husband whether post-nuptial or ante-nuptial are charged upon the community and go to diminish the joint estate.¹ On the dissolution of the community, post-nuptial liabilities attach to the extent of one-half to each moiety of the now divided estate. Ante-nuptial liabilities which have not been discharged during the marriage revert to the side from which they came.² Voet has taken the view that if the husband or his heirs have discharged the whole of an ante-nuptial debt he or they have *regresses* against the wife or her heirs in respect of one-half (see Voet 23: 2: 80). The principles of the Roman-Dutch Law stated above are intelligible when it is realised that on marriage there is community of profit and loss. But under the law of Thesawalamai such community only exists during the continuance of the marriage and hence on principle the whole of the *thediatettam* will not be liable for the ante-nuptial liability of the husband. There are authorities from which it can be inferred that the whole of the acquired property is liable only for the debts incurred by the husband during marriage.³

LIABILITY IN DELICT

Under the Roman-Dutch Law, though community of property and community of profit and loss existed, the joint estate was not chargeable as between the spouses with pecuniary liabilities arising *ex delicto*.⁴ But the question is whether the judgment can be executed against the whole of the property belonging to the community. Generally speaking, in accordance with the maxim '*culpa tenet suo auctores*'⁵ one spouse is not generally liable for the delicts of an-

1. Lee on Roman-Dutch Law, p.68. (3rd edit).

2. Grotius, 2: 11: 15; Van Leuween, 4: 23: 6; Voet, Tit. 224.

3. See M. 122, 123.

4. Nathan, Vol.3, p. 1547-8; Voet, 17. 2. 7,

5. See Justinian's Code, 9: 47: 52,

6. Grot, 1: 5: 22.

other.⁶ Hence, where the spouses were married out of community of property only the property of the spouse guilty of the delict is liable. But where the spouses are married in community and one of them has committed a delict there seems to be a doubt whether the joint estate can be made liable in full or not. According to one view, the liability even during the subsistence of the marriage, is chargeable only against the property of the spouse that committed the delict or rather against such spouse's half interest in the joint estate.¹ But the weight of authorities favours the view that during the subsistence of the marriage, the joint estate can be made liable in full for a delict committed by either of the spouses.²

Under the law of Thesawalamai the governing principle is that the separate property of each spouse is liable for the debts of that spouse. Hence, in the case of delictual liability of each spouse it is submitted that the separate property of the delinquent spouse only is liable. But regarding *thediatettam* property, in the absence of specific provision in Thesawalamai, the principles of Roman-Dutch Law governing the liability of the joint estate for the delict of either spouse married in community would apply.

Under the Roman-Dutch Law a distinction, however, should be made between delicts which amount to crimes and delicts which do not amount to crimes. If the husband commits the former, the wife's half share of the community is not liable. But if he commits the latter, the better view is that the wife's half share will be liable. This view was adopted by the Full Bench in *Cooray v. Fernando*.³ After referring to the relevant passages in Grotius, Venderkeesel, Groenewegen Rodenberg and others Their Lordships said:⁴ "On the whole we think that the weight of Roman-Dutch authorities, the general controlling influence of Roman Law and the reason of the thing, concur in bringing us to decide that the wife's half share of the common property is not bound in either civil or criminal proceedings by the husband's obligation arising out of delict amounting to crime. It will be observed that in giving judgment we do not go to the full length of deciding that there is no kind of delict which, if committed by the husband, will create an obligation affecting the wife. Cases may arise where the husband, in the *bona fide* management of

1. Lee De Villiers, p.49, *Levy v. Fleming*, 1931 T.P.D. at 170; MacIntosh and Scoble, p. 30, 2nd edit.

2. See Execution upon Common property in respect of the spouse's delictual liabilities, 52 S.A.L. 263; Mackerron, 97 by Barlow

3. 1860-1862 Ram. Rep. 94.

the common property may incur obligation *ex delicto*, without any criminal or normally wrong conduct. The plaintiff in an action on such delict might urge arguments for his claim on the wife's share which would be inapplicable here. We express no opinion one way or the other. It is submitted that these observation would equally apply to the wife's half-share of the *thediatettam* for the delict of the husband.

The Matrimonial Rights and Inheritance Ordinance (Cap. 48) as amended by Ordinance No.58 of 1947, makes it clear that the *thediatettam* is only liable for debts contracted, by either spouse. The *thediatettam* is said to be the joint property of both spouses. It is submitted that in the case of spouses governed by the Ordinance for the delictual liabilities of one spouse only his or her half-share of the *thediatettam* is liable.

STATUS IN A COURT OF LAW

We shall consider the status of a wife to sue and to be sued or a Court of law under the law of Thesawalamai. The right of the wife to sue the husband in a Court of law will also be considered. It will be remembered in this connection that both the Matrimonial Rights and Inheritance Ordinance (Jaffna) and the Married Woman's Property Ordinance do not apply to Tamils governed by the Thesawalamai. The Thesawalamai Code contains no provisions on this subject, and hence it is only by considering the decisions of our Courts that a partial solution can be effected. It is not clear from the decisions of our Courts whether the law of Thesawalamai contained any special rule on this subject. An analysis of some decisions shows that on the ground of expediency our Courts have adopted certain rules. In a *casus omissus* it was natural to resort to the Roman-Dutch Law on the subject.

Under the law of Thesawalamai it has been held that the wife cannot be sued alone without her husband being joined.¹ It is not clear whether our Judges were adopting the Roman-Dutch Law or following any peculiar customary rule in this matter. If it is a statement of the Roman-Dutch Law, it is too wide a statement, because, the Roman-Dutch Law recognised many exceptions to this general rule. Thus, under the Roman-Dutch Law if the wife was a public meretrix she can sue and be sued alone.² Conversely, it has

been held that a wife cannot sue a third party in a Court of law without joining the husband.¹ If the action is for the recovery of dowry property belonging to the wife both the husband and wife must join in the action and the husband alone cannot maintain it.² Whatever system of law has been adopted it is settled law that a wife governed by the Thesawalamai must be assisted by the husband if they are living together.

Under the early customary law, since the woman occupied a subservient place in the household, she was not allowed to bring an action in respect of her separate property against her husband during the continuance of such marriage.³ But later, our Courts seem to have taken the view that since the law recognised the separate property of the wife, a right of action should be given to her against the husband for the recovery of her property. Thus, in a case reported in Marshall's Judgments⁴ the Supreme Court said: "As the law admits of absolute and distinct separation of interest and property between husband and wife, the law must also provide an adequate remedy for either party whose right may be infringed by the other." A similar point was discussed in another case⁵ when a Bench of three Judges took the view that a wife could bring such an action against the husband but no reasons are given in the judgment. It is submitted that one should apply the Roman-Dutch Law on this matter as the Thesawalamai does not contain any precise provisions.

Divorce

Darret says that "since the Dharmasastra of medieval times has followed the texts of Manu which apparently deny the validity of divorce⁶ it is generally believed that the Hindu Law, as such, knew no such thing as divorce until it was introduced by status. This is the distorted view. A careful perusal of Manu and of Narada and the legal portions of Kautilia reveal that the widest liberty prevailed on classical times, and the Dharmashastras was shouldering a heavy task in attending to reform society. While successfully bringing the public to believe that ceremonies were necessary to constitute a

1. *Sinnepodien v. Sinnapulle*, widow of Kandi and others M. 263.

2. 1877, Ram., 366, and *Fernando v. Jacobis Appu*, 1879, 2 S.C.C. 204.

1. *Sinnepodien v. Sinnapulle*, M. 263.

2. *Visualingam v. Sabapathy*, Ram. Rep., 1872-76, p. 249.

3. See *Wallinachy v. Cadergamer*, M. 263.

4. See Marshall, p. 160-161.

5. Marshall's Judgments, 219.

valid marriage, it has not succeed in persuading Hindus that divorce was immoral". In examining the customary laws of the Tamils of Ceylon and their Kandyan brethern one sees the force of Darrett's views.

Among the Mukkuwas and Wannias of Ceylon, the widest liberty to divorce one's wife existed. Mere separation was sufficient without any further ceremony to effect a divorce. The Wannias often lived with others wives. The only penalty for this libidinous liberty was a small fine. The Thesawalamai itself provides no ceremonies for a divorce and speaks of a separation of property hen the wife or husband lives apart and contemplates re-marrying.¹ The recognition of polygamy placed no restraint on husbands getting remarried Christian dogmas have permeated the Dutch compilation of the Thesawalamai Code and hence the absence of any provision that a legal marriage. But when one examines the Customary Laws of the Tamils of Ceylon, one is forced to the conclusion that in Tamil society a divorces woman was not prevented from marrying a second time. The Thesawalamai permits the marriage of widows.

But when she remarried, she had to give up her right to the hereditary property and half the acquired property of her husband in favour of her children.² The restraint placed on the remarriage of a widow in Hindu Law in some of the texts of the Dharmasatras is traceable to Aryan influences.

1. Thes. Code. Part IV Section 1 and Part 1, Section 10)

2. see Manu, IX, p. 46, 101

CHAPTER VIII

PARENT AND CHILD

Parental power is acquired over children by the birth of a child in lawful wedlock, or by the subsequent marriage of parents, provided the child was not procreated in adultery or by adoption.

ADOPTION

The first two methods do not require any consideration but the third method being peculiar to the law of Thesawalamai merits further elaboration. Maine, referring to the form of adoption known to the Thesawalamai, says:¹ "It is a curious thing that the form of adoption which now exists in Mithila and among the Namburies of Western India, is almost identical in its leading features with that at present practiced in Jaffna. There is the same absence of religious ceremonies, the same absence of assumed new birth and the same right of adoption both by husband and wife followed by the same results as of heirship only to the adopter. It seems plain that both the Mithila and the Ceylon form arose from purely secular motives and existed anterior to and independent of Brahminical theories. The growth of these put the *Kritrima* form out of fashion. But the similar type continued to flourish in Ceylon where no such influence prevailed.." Thus, it would be clear that the law of adoption stated in the Thesawalamai Code, is of Dravidian origin and is not influenced by the Hindu Law.

Ceremonies of Adoption

The Thesawalamai Code describes the following ceremonies of Adoption.² "If a man or woman takes another person's child to bring up, and both

1. Maine Hindu Law and Usage of 9th edit., p.134

2. Thes.Code 11, sub. 1.

of them or one of them being inclined to make such child their heir, they must first ask the consent of their brothers and sisters, if there be any-if not, that of their nearest relations who otherwise would succeed to the inheritance; and if they consent thereto, saffron water must be given to the woman or to the person who wishes to institute such child as heir, to drink in the presence of the said brothers and sisters (if there be any-if not, that of their nearest relations who otherwise would succeed to the inheritance and if they consent then saffron water must be given to the woman, or to the person who wishes to institute such child as heir, to drink in the presence of the brothers and sisters) or nearest relations, and also in the presence of the witnesses, after the brothers and sisters or nearest relations and also the parents of the child shall have previously dipped their fingers in the water as a mark of consent. Although there be other witnesses, it is nevertheless the duty of the barbers and washermen to be present on such occasions".

This section contemplates a case where a married couple who have no children wish to adopt a child. They may adopt a child with a view to make him their heir only with the consent of those relations who will be entitled to properties on intestacy. Hence, one finds the provision that the consent of brothers and sisters and if there are no brothers and sisters, then the consent of the nearest relations should be obtained. If they consent, then the brothers and sisters dip their fingers in saffron water as a mark of consent and the adoptive parent drinks the saffron water. Saffron is often used among Tamils on all festive occasions. Adoption also being a happy event in that new person becomes a member of the family it became customary to use saffron water on such occasions. A number of witnesses are also required to witness this ceremony in order that the fact of adoption may be subsequently proved in a Court of Law. It is stated that among the witnesses the washerman and the barber are present on such occasions. The washerman and barber are important *kudimakal* of the household and their presence is insisted upon on all important occasions.

From some of the cases reported in Muttukrishna's Thesawalamai, one may have an insight into the rituals that were stressed in cases of adoption. In a case reported in Muttukrishna's Thesawalamai the following ceremonies are described:-

"The relations of both the husband and wife assembled. In the presence of the relations and the family, barber and washerman, the adopting

parties presented betel leaves and arecanuts to their relations, the barber and the washerman. Then a cup of saffron water is sent round among the relations and the parties dip their hands as a mark of consent. Then the saffron water is drunk by the adopting and adopted parties after which there is a feast and the adopted child is carried away."¹ During the Dutch regime a registry of adoptions was kept but none has been kept since the establishment of the British Government. Courts often decided the question whether there has been an adoption or not on the evidence in each case.² It would appear that the sanction of the Magistrate was necessary at a certain stage. Later, the sanction of the authorities was substituted for that of the Magistrate.³

Persons Who Could be Adopted

During the Portuguese period a person can only adopt the nephew or niece, and not a stranger. De Queyroz says:⁴ "If there are no sons, the heritage devolves on the brother, for they cannot adopt a stranger unless it be a nephew, the sons of a brother and if of a sister, it will be with the consent of the one to whom the heritage is due." There is ample evidence in the Thesawalamai Code to support this view. Thus the Code says: "It is the children of the brothers and sisters who should be adopted. If the brothers and sisters refuse to give their children, then a person may adopt a stranger's child. But in such a case the adoptive parents are not at liberty to drink saffron water without the consent of their brothers and sisters or of those who claim themselves to be witnesses."⁵ In spite of opposition by the brothers and sisters, a person may adopt a stranger's child. but in such case the consent of the Magistrate had to be obtained because it is said that "such a course would enable one to exercise his powers within the bounds of discretion and also it would prevent persons from adopting other children from motives of hatred towards their relations."⁶

When strangers have been adopted in this way the adoptive parents could only bequeath 1/10th part of the husband's hereditary property or 1/

1. See Re Cadiry-o, 3634, M. p. 308.

2. M. 309.

3. Vide Cadersai Candappa and his wife Nagutte v Nagin Ambalavanar, M. p. 305.

4. De Queyroz, Vol. I, p. 52.

5. Thes. Code II, 1.

6. Thes. Code II, 1.

the ways in which a customary marriage that took place several years ago could be proved. The best evidence that could be led to prove a customary marriage will be the testimony of those who were present at such a marriage and who will testify to the fact that after marriage the parties lived as husband and wife. If the only evidence available to prove marriage is the testimony of witnesses who state that the parties lived as husband and wife and were received by their relations and friends as such, only a presumption of valid marriage arises. It is open to the party who denies the marriage to show that in fact no marriage ceremony was gone through. Hence, is always prudent to lead evidence that the parties lived as husband and wife and were received as such by the relations.

The question whether the essential ceremonies of a marriage have been gone through is often a question of fact and the appellate Court will not lightly interfere with the finding of the lower Court on this point. The case of *Sinaval v. Nagappa*¹ requires consideration. In this case, evidence was led to prove that among the people belonging to the Nallava caste the bride and bridegroom had eaten rice and betel before their relations and that this ceremony was sufficient to constitute a marriage. The Magistrate has come to the conclusion on the evidence that valid marriage did not take place. In appeal Shaw, J., said: "The Maniyagar says that amongst people of the Nallava caste, the eating of rice and betel before the family is sufficient to constitute a valid Hindu marriage without the more formal ceremonies which are practised by persons of a higher class. The Magistrate has come to the conclusion on the evidence that the parties did not go through a ceremony of marriage and had, in fact, never lived together at all either as husband and wife or as man and mistress. I confess that I have felt some difficulty on the finding of fact. The evidence as recorded would appear to me to more strongly support the case for the applicant than that of the defendant, and were I deciding this case unbiased by the finding of the Magistrate and upon the recorded dispositions, I should probably find in favour of the applicant. But that is not sufficient to enable me to reverse the Magistrate's finding." His Lordship proceeded to state that as an appellate Judge he will not interfere with the finding of fact of the Magistrate who has seen and heard the witnesses. Perhaps had the parties lived as husband and wife the Magistrate might have come to a different view.

It is submitted with respect that the reasoning in this case cannot be

1. 6 B.N.C., p. 26.

whom it came, or to their heir. If the adopted person died leaving acquired property, we are not told how it devolved. Perhaps, in such a case, it devolved on his heirs. The provisions of Roman-Dutch Law cannot be invoked since adoption was unknown to the Roman-Dutch Law.

The Code provides for succession *inter se* between two adopted children when they marry each other. The Code says: "If a husband and wife adopted two children a boy and a girl who are not related to one another by blood, so that they can marry together, and if both husband and wife drank saffron water in the manner as above stated, and if both the adopted children married each other after they arrive at the age of maturity, and at the expiration of time one of them dies without leaving a child or children, then the survivor inherits the whole on account of the adoption which binds them as brother and sister and not in the blood. It goes in the same manner if husband and wife, after having adopted a boy, have a daughter of their own. Such a boy is allowed to marry the daughters provided they are not nearer related by blood than brothers' and sisters' children, and they inherit from one another as before mentioned."¹

This section provides that if an adopted child marries another adopted child and dies without issue, the latter becomes the heir of the former. No provision is made where there are two adopted children who do not marry each other and one of them dies. Probably in such a case, giving effect to the spirit of the Thesawalamai, one will succeed the other just as a brother succeeds the sister.

The Thesawalamai makes provision for the division of property among adopted children, to the adoption of whom, some of the relations of persons adopting consent, while the others refuse. The Code states:- "If a husband and wife wish to adopt another person's child, to which adoption some of his brothers and sisters or nearest relations consent, and others do not consent, in such a case the husband and wife are at liberty to adopt such a child, and to make him the heir to so much as the share amounts to of those who have consented to the adoption, and who, as a token thereof, must have dipped their fingers in the saffron water drunk by the husband and wife, leaving the inheritance to which the non-consenting party is entitled at their disposal; until such time as husband and wife, or one of them dies, when the child and each of them take the shares to which they are entitled. But if the

1. Thes. Code, II, 4.

said heirs, either through negligence or otherwise, permit or allow the adopted person to remain for several years in the peaceable possession of the property, the heirs by their silence forfeit their claim and title thereto."¹

This section deals with a case where some of the relations consent to the adoption and other relations object to the same. In such a case on the death of the adoptive parents the share that would have devolved on those relations who consented, if not for the adoption, would devolve on the adopted child. Though the language is not clear it would appear that the heirs who have not consented would inherit their shares. If, however, the heirs permitted or allowed the adopted children to be in peaceable possession of the property for several years, the heirs by their silence forfeited their claim and title to the said property. The last portion of this section deals shortly with the law of prescription peculiar to the law of Thesawalamai.

The Code also makes provisions where one of three brothers adopt a child belonging to one. The Code says: "If there are three brothers, one of whom has two children and the other two have none, and if one of them wish, from motives of affection, to adopt one of his brother's children, which the other brother who has also no children does not approve, the two brothers may carry their design into execution, leaving to the third brother the action which he pretends to have on the inheritance. On the death of such adopting brother all his property is divided equally between the non-consenting brother and the adopted child who share and share alike. If the non-consenting brother, who has no children, wishes to give some property to the child who has remained with the father unadopted, the question is, whether the adopted child can prevent it? The general opinion now is that on account of the right which he had thereto (as nephew and heir of his uncle) being lost by the adoption, he must allow the giver to do with his property what he pleases as long as he lives."²

Change of Caste

One of the incidents of a valid adoption is that the adoptive child changes his caste. The Code says:³ "If a man adopts in the manner above stated a youth of a higher or lower caste than his own, such a child not only inherits his property, but immediately goes over into his adopted father's caste,

1. Thes. Code, II. 3

2. Thes. Code, 11. 4

3. Thes. Code, 11. 6

whether it be lower or higher than his own. But if a woman adopts a child, such a child cannot go over into her caste, but remains in the caste of his own father, and will only inherit the woman's property after her death."

"If a man adopts a girl of another caste in the manner above stated, she goes over into the caste of her adopted father, but not her children or descendants: for if she marries, and has a child or children, they follow their father, except among slaves, in which case it has another tendency, for there the fruit follows the womb."

This statement of the law makes it clear that this is one of the rules brought by the later Tamils amongst whom the patriarchal system of society prevailed. This is the reason why when a man adopts a child the adopted child follows the caste of the father but where a woman adopts a child the latter retains his original caste. Again, where a man adopts a female child and the latter has children such children take the caste of their own father. An exception, however, is made in the case of slaves, we are told that the children follow the status of their mother. This provision may be compared with the general rule of *Jus Gentium* that in the case of slaves the children follow the status of the mother.¹

THE LAW OF ADOPTION PECULIAR TO THESAWALAMAI IS OBSOLETE

The law of adoption so far discussed only has a historical interest. It has become obsolete for many years. There are only a few cases reported in the collection of cases by Muttukrishna dealing with adoption. There is not a single case of adoption reported in our Law Reports in recent times. so much so, that in the Jaffna Matrimonial Rights and Inheritance Ordinance no provision has been made for the succession of adopted children. After the passing of the Matrimonial Rights and Inheritance Ordinance, even if a child is adopted in the manner set out, the old law governing succession has been impliedly repealed by virtue of the provisions of section 40 of the Ordinance and the adopted child gets no rights of succession as under the old law. Many reasons may be suggested why adoption became obsolete. Adoption was intended as a substitute for testamentary power. Sir Henry Maine has shown that people to whom the idea of testation was unknown adopted this device. When the law of wills develops, the law of adoption usually becomes obsolete. Thus adoption in Roman Law and in the Thesawalamai became obso-

1. Buckland's Text Book of Roman Law, 2nd Edition, p. 68.

lete with development of law of testation.

The Thesawalamai Commission recommended that the provision of the Thesawalamai pertaining to adoption should be repealed¹. (Jus Gentium that in the case of slaves the children follow the status of) In view of this recommendation the law of adoption should no more be in the Statute book. In the Revised Legislative Enactment, the Commissioner who was given power to omit or delete any obsolete provision of law has however failed to omit these provisions. As these provisions re-appear in the Revised Legislative Enactments, could it be said that the law of adoption known to Thesawalamai is obsolete? We have seen earlier that when even repealed provisions appear in the revised legislative enactments, they have the force of law. *A fortiori* it may be contended that obsolete provisions when they re-appear in these enactments have the force of law. But the most important legal consequence of adoption is succession. In Ordinance 1 of 1911 no provision is made for the succession of adopted children. Hence, even if adoption as known to Thesawalamai is recognised it has no legal consequences.

The Adoption of Children Ordinance No. 24 of 1941 makes provision for the adoption of children. Part 1 of this Ordinance makes provisions governing "adoption orders" and the registration of adoptions. Section 16 states: "The provisions of this part shall be in addition to and not in substitution of the provisions of any written or other law relating to the adoption of children by persons subject to the Thesawalamai or the Kandyan Law; and notwithstanding anything to the contrary in such other law an adoption order may be made authorising any such person to adopt a child; and where made shall have effect in accordance with the provision of this part."

Thus, it could be seen that even a person governed by the Thesawalamai can adopt a child following the procedure indicated in this part and when such adoption takes place the incidents mentioned in Part 1 of this Ordinance operate.

RIGHTS AND OBLIGATIONS OF CHILDREN

It is not necessary to state in detail the rights and obligations *inter se* of the parent and the child. Only those peculiar rights of the parents under the law of Thesawalamai will be discussed in detail.

1. Sessional Paper No.3 of 1930.

The rights of the parents under the Roman-Dutch Law may be summarised as follows: ¹

- (1) The right to the control and custody of the child.
- (2) The right to provide a testamentary guardian.
- (3) The right to consent to the marriage of minor children.
- (4) The right to administer the property of the minor.
- (5) Rights in the minor's property.
- (6) The right to be supported in times of illness.

In addition to those duties there is another duty imposed by the old law of Thesawalamai, namely, the son must pay the debts of the father.

The duties corresponding to the first two rights need not be considered as the Roman-Dutch Law governs such matters. But the other rights and the corresponding duties merit further consideration.

Right to Give Consent

We have already dealt with this aspect earlier. It is sufficient to say that the consent of the father must be obtained if he is alive. If the father is dead, the consent of the mother is necessary. If the parents are dead, the consent of the guardian appointed by Court is necessary. We have already considered the effect of want of consent on a customary marriage which otherwise would be valid.

Right to Administer the Property of the Children

Under the early law, if the mother dies first, the father remains in full possession of the estate so long as he does not marry. So long as the widower does not remarry, he has a life interest in the wife's properties. The wife's estate did not therefore vest in the children absolutely.² The position is different if the father remarries. The Code states:³ "If the father wishes to marry a second time, it is stated that the mother-in-law generally takes the child or children (if they still be young) and in such a case, the father is obliged to give

1. See Lee on Roman-Dutch Law, 4th edit, p.36-43.

2. See 1900, 5 Tamb. 145, *Chellappa v. Arumugam*.

3. Thes. Code, II.

at the same time with his child or children the whole of the property brought into the marriage by his deceased wife and a half of the property acquired during the first marriage. Interpreting the provision of this statute there are various decisions of the Supreme Court which laid down the principle that when a man married a second time he was obliged to hand over the custody of the child and the wife's property and half of the acquired property to the parents-in-law by the first, marriage. But in a later case the earlier view has been doubted. Similarly, the mother has the right to control the property if the father dies first. Thus the Code says: "If the father dies first, leaving one or more infant children, the whole of the property remains with the mother. But when she gives her daughters in marriage, and she is obliged to give a dowry, the sons may not demand anything so long as the mother lives."¹

If the mother marries again and has daughters by both marriages, she is obliged to dower them from her own dowry property. If the son or sons marry or wish to leave her, she is obliged to give them the hereditary property brought in marriage by their father and half the acquired property after deducting these from the dowry which has been given to the daughters."²

But by the Jaffna Matrimonial Rights and Inheritance Ordinance,³ it is enacted that when the estate of a deceased parent devolves on minor child, the surviving parent may continue to possess the same and enjoy the income thereof until such child is married or attains majority. The provision of the old Thesawalamai that a spouse who re-married must hand over the property to others has not been reproduced. It is also enacted that so much of the provisions of the collection of customary laws known as Thesawalamai which are inconsistent with the provisions of the Matrimonial Rights and Inheritance Ordinance are repealed. Hence, it is submitted that Ordinance No. 1 of 1911⁴ has changed the law on this subject and the surviving spouse though married again is given a life-interest over the property devolving on the minor till the minor gets married or attains majority.⁵

On the death of one spouse, the surviving spouse who is governed by Thesawalamai has the custody of the property devolving on the minor

1. Thes. Code, 9.
2. Thes. Code, 10.
3. Cap. 48, section 37.
4. Cap. 48.
5. See 151 elseq, p.

children but he cannot claim compensation for improvements since he is in the position of usufructuary. In coming to the conclusion regarding compensation the Court applies the Roman Dutch Law.¹

Rights in Minor's Property

Under the old law of Thesawalamai, as community of property was recognised, the sons were bound to bring into the common estate all that they had gained during their bachelorhood. An exception was made in the case of wrought-gold or silver ornaments worn by them which have been acquired by their exertions or given by the parents. "This happens," says the Code, "even if the sons were married and have quitted the parental roof."² This rule is taken from the Hindu Law. It has been stated previously that Hindu law was administered when Sir Alexander Johnstone paid his first visit to Jaffna. Due to the impact of Hindu Law various customary usages were influenced. Lawrie, A.C.J., says in *Umayatipillai v. Murugesar*³ "As the Malabar inhabitants of the Northern Province are Hindus in religion and race, it is natural to find in the customary law some traces of the law of Hindu joint family, but there are traces only. The law of the joint family has never obtained in Ceylon." It is submitted with respect that the last part of this dictum is not historically correct.

Rights of Maintenance

Under the law of Thesawalamai, it is the duty of the sons to support their aged parents. Thus, the Thesawalamai Code says: "Should it happen that age renders the parents incapable of administering their own acquired property, the sons divide the same, in order that they may maintain their parents with it and it will be often found that sons know how to induce their parents to such a division of resignation of their property with a promise of supporting them during the rest of their life: but should the sons not fulfil promise, the parents are at liberty to resume the property which has been divided among the sons which is not done without a great deal of trouble and dispute. And the experience of many years has taught us that such parents (in order to revenge themselves on their sons) endeavouring by unfair means to mortgage their property for the benefit of their married daughters or

1. *Arumugasamy Tyer vs. Muthucumaraswamy* 72 N.L.R. 136 (Section 37 of the Jaffna Matrimonial Rights Ordinance)
2. Thes. Code, 1. 7.
3. 3 Bal. rep. 120 at 121.

their children and for this reason it has been provided by the Commandeur that such parents may not dispose of their property either by sale or mortgage without the special consent of the Commandeur which is now become law."

It is clear from this statement of the law that only where the parents are incapable of administering their acquired property that they divide them among the children and it is only when such a division takes place that the Thesawalamai imposes a duty on the children to support their parents. If the children refuse to support the parents after taking control of the properties, the penalty provided was that parents could resume possession of the properties. Under the earlier law they could mortgage and sell their properties. But due to certain abuses it was ordered that they could not do so without the special consent of the Commandeur. This provision is obsolete; and now, in view of the provision of Ordinance 7 of 1840,¹ a notarial conveyance is necessary to convey immovables.

The Thesawalamai contains no provision whereby an obligation is cast on the children to support their parents when the parents had left no acquired property to be divided among them. But by the general law of the land, the Roman-Dutch Law, a son has to support his aged father who is in indigent circumstances.²

The rights of maintenance is reciprocal. The father must support his child till the child is 18 years old. The law on this subject is now contained in the Maintenance Ordinance.³

It is also provided by the Matrimonial Rights and Inheritance Ordinance (Jaffna) that when the estate of a deceased parent devolves on a minor child, the surviving parent may continue to possess the same and enjoy the income thereof.⁴ The surviving spouse who continues in possession of the estate of the deceased spouse shall be bound to maintain the children till they attain majority.⁵ A married woman, governed by the Jaffna Matrimonial Rights and Inheritance Ordinance⁶ having separate property adequate for

1. The Frauds and Perjuries Ordinance.

2. See Lee 3rd., Ed., p. 37; Voet, 25: 3: 8: *Wright v. Wright*, 1907. T.H. 204.

3. Cap. 76.

4. Section 37 of Cap. 48.

5. Section 38 of Cap. 48.

6. Cap. 48

the purpose shall be subject to all such liability for the maintenance of her children as a widow is now by law subject. This, however, does not relieve the husband from his liability to maintain his children.¹

Right that Son should pay Father's debt

The obligation on the part of the son to pay his father's debt is peculiar to the Law of Thesawalamai and is derived from the Hindu Law. In the view of Hindu jurists a debt is not merely an obligation but a sin, the consequences of which follow the debtor into the next world. Thus, Brihaspati says: "He who, having received a sum lent or the like, does not pay it to the owner, will be born hereafter in his creditor's house a slave, a servant, a woman, or a quadruped."² Narada, one of the Hindu jurists, says: "When a devotee or a man who maintained a sacrifice fire, dies without having discharged his debt, the whole merit of his devotion or of his perpetual fire belongs to his creditors."³ The Hindu Law created various exceptions to the general rule that the son should pay his father's debt. Such exceptions may be classified as follows:-⁴

- "(1) Debts due for spirituous liquors
- (2) Debts due for lustful pleasures
- (3) Debts due for losses at play
- (4) Unpaid fines
- (5) Unpaid tolls
- (6) Debts for anything idly promised
- (7) Suretyship debts
- (8) Commercial debts
- (9) Debts that are not."

The Hindu Law on the subject appears to have been applied according to Sir Alexander Johnstone's report during the early years of the British occupation.

Adopting the Hindu Law, under the earlier law of Thesawalamai, it was the duty of the children to pay the parents' debt whether they inherit property from the parents or not.¹ Later, the view has been expressed that if

1. Section 13 of Cap. 48.

2. Dig. I. 228.

3. Narada, 1. 9. S.B.E. Vol. XXXIII, p. 44.

4. Mayne Hindu Law, 10 ed., p. 407, 408.

the sons did not inherit any property from the parents they are not liable for the debts of their parents.² Though the sons were liable to pay the father's debts such a duty was not cast on the daughters.³ Still later, the view was expressed that a son is not liable for his father's debts unless the father has left property and the son has taken possession of the same.⁴ The whole law on this subject was subsequently settled by a Full Court decision,⁵ where it was held that a son may exonerate himself from the debts of his deceased parent by declining succession to the inheritance. It is submitted that this provision of law is obsolete now. The law on this subject is now the same as the general law applicable in Ceylon.

There is evidence to show that for a considerable period the Hindu Law was consulted on this subject by the Courts in Ceylon. Thus, in the case of *Raman Velappen v. Soopremanam*.⁶ Liesching, J., who heard the case said: "according to the Common Law of the land, which must guide the Court, it is clear that although the parents do not leave anything, the sons are nevertheless bound to pay debts contracted by their parents..... However, the general proposition of the Thesawalamai is qualified in Stranger's Hindu Law, p.347 by the remark "That to exonerate himself from payment of debts the son must decline succession to the property."

Since this notion was foreign to the Roman-Dutch Law, it cannot be said that the learned Judge was referring to the Dutch Law when he referred to the common law of the land. It was assumed that where there was a *casus omissus* in the law of Thesawalamai, the Hindu Law should be resorted to. This surmise is further strengthened by the fact in the case referred to, a treatise on Hindu Law had been consulted. Applying the principle that the Roman-Dutch Law is the common law, our Courts had to look to the provisions of Roman-Dutch Law for the development of this principle. As this principle is alien to Roman-Dutch Jurisprudence it was not developed by our Courts.

1. M. 296, case No. 1531, M. 297 *Annapillai v. Moorgen*.

2. M. 298 *Wilayder Cander v. Ramaswamy Soopremanam*.

3. M. 300.

4. Morgan's Digest, 264.

5. 1 Lorenz, 224 *Valapery v. Pattaniar*, F.B.

6. M. 306.

CHAPTER IX

GUARDIANSHIP

GUARDIANSHIP UNDER THE COMMON LAW

In Roman Law there were three kinds of guardians:

- (1) *Tutores Testamentari*, that is to say, guardians appointed by the Pater-familias by a will;
- (2) *Tutores Legitimi*, that is, the nearest agnates (later cognates) of the minor, who functioned in the absence of a testamentary tutor;
- (3) *Tutores Dativi*, that is, guardians appointed by the Court in the absence of either of the first two classes mentioned above.¹

Under the Roman-Dutch Law all guardians were either (1) Testamentary or (2) Appointed. The intermediate class of *tutores legitimi* disappeared.² The father, the grandfather and grandmother are preferred to all others in the guardianship of their children and grand children. This guardianship, the father and grandfather, retain for their natural lives, but the mother and grandmother only retain it till they get married again. The father, grandfather, mother or grandmother are often appointed guardians with another co-guardian.³

Under the Law of Ceylon a guardian takes control of the person and a curator is appointed to take charge of his property. A parent is the natural guardian of the minor. Normally the Court will not deprive the parent of that character and appoint another in the parent's place, unless very strong circumstances are proved against the character and conduct of the parent.⁴ It has been said that the father is by nature and nurture guardian of his minor

1. Buckland's text book, p. 143-148.

2. Lee, p. 99 (3rd Edition.)

3. Walter Pereira, p. 195.

4. 1863, Morgan's Digest 112; 2 Thomp. 50.

child. A mother does not, on the death of the father, become the curator of a minor child, except by appointment by Court.¹ But, the mother is by law the natural guardian of her infant children and is entitled to look after him. Therefore it is unnecessary for the mother to apply to Court for authority to be a guardian.² Thus, it may be observed that, under the common law, as administered in Ceylon, the father is the natural guardian of the minor child whether he contracts a second marriage or not. In the law of Thesawalamai the only question that has to be considered is whether the father loses his guardianship over his children on re-marriage. All other incidents of guardianship are governed by the general law of the land and require no treatment in this thesis.

GUARDIANSHIP UNDER THE THESAWALAMAI

The law on this subject cannot be understood unless the section of the Code dealing with this aspect is quoted *verbatim*. The Code states: "If the father wishes to marry a second time, the mother-in-law or nearest relation generally takes the child or children (if they be still young) in order to bring them up; and in such a case the father is obliged to give at the same time with the child or children the whole of the property brought into the marriage by his deceased wife and half of the property acquired during his first marriage. Where these children are grown up and able to marry, that is to say, the daughters (if any there be) the father must go to the grandfather or grandmother with whom the children are, in order to marry them and to give them a dowry both from the deceased mother's marriage portion and from the acquired property, which, as before stated, had been given to the relations with the children and from his own hereditary property." Thus a customary rule is recorded that when the father re-marries, generally the grandmother or near relation takes the custody of the children and becomes the *de facto* guardian.

This section has been interpreted by several decisions of our Courts. It was strictly construed in an early case and the view was taken that the maternal grandmother becomes the legal guardian of the minor child when his father contracts a second marriage.³ In the case of *Kanapathipillai v. Sivakolunthu*⁴ it was contended that these provisions of Thesawalamai had become obsolete. Lascelles, C.J., in dealing with this matter⁵ says: "It has been suggested in argument that this part of the

Thesawalamai is obsolete; but I am unable to agree with this view. We have been referred to no enactment which either expressly or by necessary implication repeals this part of the Thesawalamai. It is also said that section II is a portion of that part of the Thesawalamai which deals with inheritance and it is only incidentally that it refers to the case of guardianship and curatorship. This is true; but at the same time the passage which I have cited does contain a distinct statement of the customary law of the Tamils as regards the rights of the maternal relations of the child with regard to the person and property of the child where the father is married a second time. I agree that there is nothing in the words of the enactment which makes it in all cases imperative on the Courts to entrust the guardianship to the maternal relatives and that the discretion of the Courts... to have regard to the best interests of the child is not entirely excluded. But I think that it is necessary in order to give effect to the intention of this provision that the Courts should not depart from the general principle there laid down without some substantial reason for so doing." The effect of this decision is that if the father re-marries, the maternal grandmother becomes the guardian of the minor child, unless the Court in its discretion decides on sufficient evidence that the maternal grandmother should not be entrusted with the guardianship in the interests of the child.

In *Theivanapillai v. Ponniah*¹ it was argued that where the grandmother takes the custody of the child she could not ask for any maintenance for the child from the father. Pereira, J., in dealing with this argument said: "The provision of the Thesawalamai relied on is a provision that had long been supposed to be obsolete, but which appears to have been re-animated by the judgment of this Court in the case of *Kanapathipillai v. Sivakolunthu*.² The terms in which this provision is expressed appear to me to indicate that it was a mere custom regulated in each individual case more or less by arrangement between the parties. Anyway, the grandmother is said to take the children over "to bring "them up" and for that purpose she is to get all the property mentioned above. I do not think that it was ever intended that she should be entitled to look to the father for the maintenance of the children. If she cannot maintain the children, she should return them and the property to the father. At the same time it is clear that the Tamil law recognises the grandmother or the other relation who takes over the children, on a second marriage of the father, as a suitable guardian, and she may well be allowed to keep the children as against the father, in case the father happens to be a person not fit to be entrusted with

1. 18 N.L.R. 353, F.B.

2. *Croos v. Vincent* 22 N.L.R. 151, (1920).

3. See No. 9, 528. *Filleander v. Sothalingam*, M. 649.

4. 1911, 14 N.L.R. 484.

5. In 14 N.L.R. 484 at 485.

1. 1914, 17 N.L.R. 437.

2. 14 N.L.R. 484.

the children, and in that case, the father would be liable to make full provision for their maintenance." In this case it was found, as a question of fact, that the father was unfit to be the guardian of the minor child and that he had been guilty of cruelty.

In the case of *Annapillai v. Saravanamuttu*,¹ the grandmother of a minor child claimed maintenance from the father. The father resisted this application on the ground that he was prepared to maintain the child. The Supreme Court allowed the appeal and in dismissing the application held that under the Thesawalamai a natural grandmother has no absolute right to the custody of her grandchildren where the father contracts a second marriage and is able to *maintain them*. Justice de Kretse, after stating that paragraph II of the Thesawalamai Code is not of universal application says: "But a further question arises. Paragraph II combined the question of custody of the children with surrender of property. But Ordinance 1 of 1911 gave the father a life interest in his wife's property until the children attained majority and the children had no right to possession of their mother's property on their father's second marriage. Is the situation not changed? When section 40 made express provisions for the maintenance of the children during their minority and said nothing about the case of the father marrying a second time, is it unreasonable to infer that the Legislature thought, as Pereira, J, did, that paragraph II was obsolete and was impliedly repealed? The two provisions are really inconsistent. The obligation to maintain during minority is not inconsistent with the provisions of the Maintenance Ordinance, which fixes a different period."

In this state of authorities, the question was brought to a sharp focus in the case of *Ambalavanar v. Ponnammamma and the Secretary, District Court, Colombo*.² A Bench of two Judges held that the father of a child subject to the Thesawalamai has, if he is not for any reason unsuitable as a guardian, a paramount right to the custody of his child. In this case the District Court granted the custody of the child to the grandmother in guardianship proceedings following the ruling in *Kanapathipillai v. Sivakolunathu*.³ The Supreme court set aside the order of the District Court and granted the custody of the child to the father. It was proved that the child would have been happy either with the father or with the grandmother. Kretser, J., in the course of his judgment, says:⁴ "The first thing to decide is whether paragraph II of the Thesawalamai has been repealed. Chapter 48 deals with the matrimonial

rights of husband and wife with reference to property and with the rights of inheritance; section 40 enacts that so much of the provisions of the Thesawalamai as are inconsistent with the Ordinance are repealed by it. The Thesawalamai¹⁶ purports to be a collection of the customs of the Inhabitants of Jaffna made by Governor Simons in 1706, and the heading of this collection states the subjects covered by it. Guardianship of minors is not one of the subjects mentioned. Part 1 expressly deals with "Inheritance and Succession to property." Presumably that part would be repealed by Chapter 48 which deals with property. Paragraphs 9 and 10 deal with the position where the father dies and children and their mother are left. Paragraph 11 deals with the case of the mother dying and the father and children being left. The case of both spouses is now dealt with by section 37 of Chapter 48. The obvious result is that paragraph 9 to 11 are no longer of effect. Chapter 48 had not been brought into force at the time *Kanapathipillai v. Sivakolunthu* was decided and in the course of his judgment Lascelles, C.J., repelled the suggestion that paragraph 11 had become obsolete. He seems to have thought that paragraph 11 contained a statement as regards the rights of the maternal relations with regard to the person and property of the child when the father is married a second time, and later he speaks of the rule of Thesawalamai with regard to guardianship. With all respect to him, I think he went too far if he meant to say that the paragraph stated an absolute right and a universal rule as regards guardianship alone..... That paragraph would only indicate a family arrangement which very commonly was made, but it was an arrangement and nothing more."

If the husband dies first and the mother gets married again, the question is whether she has rights as guardian. Section 10 of Part 1 of the Thesawalamai Code states that such a mother must dower her daughters and if the son or sons wish to quit her she is obliged to give them the *Mudusam* property brought into the marriage by their father and the half of the acquired property obtained by the first marriage. From this statement of the law it appears that under the old Thesawalamai if a son wished to leave her she could not prevent him. Hence, it cannot be said that she is the guardian of her sons.

1. Cap. 51.

1. 40 N.L.R. 1.

2. 1941, 42 N.L.R. 289.

3. 14 N.L.R. 484.

4. 42 N.L.R. 295.

CHAPTER X

DIVISION OF PROPERTY

DIVISION OF PROPERTY IN THESAWALAMAI

Property may be classified in various ways. In the Civil Law and systems based on it, property is divided into movables and immovables, *res corporales* and *res incorporals*, *res fungibiles* and *res non fungibiles*, etc. In early Hindu Law, property was divided into hereditary property and acquired property. Later the right of a married woman to own her property separately was recognised and her separate property was called *stridhana*. The customary laws of the Tamils, particularly the Mukkuwa Law, recognised the distinction between hereditary (*mudusam*) and acquired property (*Thediatettam*). The same distinction is found in the law of Thesawalamai. The separate property of the wife came to be known as *chidenam* in Thesawalamai and had an independent origin.

The Thesawalamai distinguished between hereditary property brought by the husband or wife (*mudusam*), dowry property brought by the wife (*chidenam*), and acquired property (*thediatettam*). As Ganapathi Iyer in p.37 of Hindu Law says, this division closely corresponds to the division of property in Hindu Law into hereditary property, *stridhanam* and self-acquired property though the incidents are not, in all cases, the same.¹ This classification is not exhaustive. Property derived by a person after marriage from a stranger, otherwise than for valuable consideration, may not come under any of the categories already mentioned. Hence, under the old law of Thesawalamai, there was a fourth class of property which for the sake of

convenience may be called "residuary property."

CLASSIFICATION OF PROPERTY UNDER THE JAFFNA
MATRIMONIAL RIGHTS AND INHERITANCE ORDINANCE OF 1911

The Jaffna Matrimonial Rights and Inheritance Ordinance (Cap, 48) adopted a slightly different mode of classification. Property devolving on a person by descent, at the death of his or her parent or any other ancestor in the ascending line is called *mudusam*.¹ Property devolving on a person by descent at the death of a relative other than a parent or an ancestor in the ascending line is called *urumai*.² The grand division of property is "property derived from the father's side and property derived from the mother's side." Property received by any person in *mudusam*, *urumai* or in dowry or under a will as heir or legatee or in donation, or in a manner other than for pecuniary consideration from a father or any of his ascendants or any of his collateral relations is said to be property derived from the father's side.³ Property received in *mudusam* or *urumai*, or in dowry or under a will as heir or legatee or in donation, or in a manner other than for pecuniary consideration from a mother, or any of her ascendants, or any of her collateral relations is said to be property derived from the mother's side.⁴ *Thediatettam* of any husband and wife is defined as

- (a) property acquired for valuable consideration by either husband or wife during the subsistence of marriage,
- (b) profits arising during the subsistence of marriage from the property of any husband or wife.⁵

The Jaffna Matrimonial Rights and Inheritance Amendment Ordinance No. 58 of 1947 defined "*thediatettam*" in a negative way. It states: "no property other than the following shall be deemed to be *Thediatettam* by a spouse -

- (a) property acquired by that spouse during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estates of the spouse;

1. See Maine's Hindu Law and Custom, 10th edition, page 7.

1. Matrimonial Rights and Inheritance Ordinance, Jaffna, Section 15 of Cap.48.

2. Non-patrimonial Inheritance, Section 16 of Cap.48.

3. Section 17 of Cap. 48.

4. Section 18, Cap. 48.

5. Section 9, Cap. 48

- (b) profits arising during the subsistence of the marriage from the separate estate of that spouse Ordinance came into force there is another class of property which for convenience we may term "residuary property"; for instance, property donated by a stranger not coming within the categories of property already mentioned.

and when brought by the wife were denominated in the Tamil language *chidenam* or by us dowry ..." It is rather unfortunate that a correct legal terminology was not adopted by the fortunate of the Code. The term "goods" is only used in modern law to connote movables, but in the context it means both movables used as if it is synonymous with *mudusam*. In general, *mudusam* property connotes hereditary property. This is evident from the Thesawalamai Code which says: "On the death of the father all the goods brought in marriage by him should be inherited by the son or sons and when a daughter or daughters married they should each receive dowry of *chidenam* from their mother's property; so that invariably the husband's property remains with the male heirs, and the wife's property with the female heirs but the acquisition or the *thiatettam* should be divided among the sons and daughters alike; the sons, however, must always permit that any increase should fall to the daughter's share".

Thus, it is clear that under the early law, hereditary property of a person comprised the father's separate property and half of the father's acquired property. If there were daughters, the whole of the mother's property was given to the daughters as dowry. If there were no daughters, then hereditary property consisted of the separate property of the father, mother and the acquired property of both. Later, we are told that in process of time, and in consequence of several changes by Government, particularly those in the Portuguese era, several alterations were gradually made in these customs and usages according to the testimony of the older Mudaliyars. Dowry was taken indiscriminately from the dowry property of the mother, the hereditary property of the father or from the acquired property of both."¹

Mudusam property consists of hereditary property and does not in any way include property which a person has not inherited from his parents or relations. so long as the parents were alive, whatever the son acquired belonged to the parents.²

1. Thes. Code 1.2.

2. Thes. Code 1.7.

CHAPTER XI

MUDUSAM (ANCESTRAL PROPERTY) ORIGIN OF MUSUSAM

The distinction between acquired property and ancestral property is found in many systems of law prevalent in South India and Ceylon. In the Marumakattayam Law there is this fundamental distinction. In the Mukkuwa Law, too, this division of property is found. It is interesting to note that the words used to connote these conceptions, in the Law of Thesawalamai and the Mukkuwa Law are identical. In both systems ancestral property is called *mudusam*. The Mukkuwas came to Ceylon in the 2nd Century A.D. and their laws did not undergo any appreciable change. As the same distinction exists in Marumakattayam Law, which as submitted earlier, is an off-shoot of the Mukkuwa Law, it is safe to presume that this fundamental distinction existed under the early law of the Tamils. The fundamental division of property in Kandyan Law is between acquired property and ancestral property (*paraveni property*). The Kandyans had constant intercourse with the Tamils and hence might have borrowed many legal and political institutions from South India. Hence, we may conclude, that among the ancient Tamils, the distinction between ancestral and acquired property existed. As Maine remarks, the Hindu Law itself derived many conceptions from the customary laws of the people of India. It is probable that Aryans borrowed the incidents of the joint family system which prevailed among the indigenous races and modified it to suit a patriarchal society. In doing so, it is likely that they borrowed conceptions of acquired property and ancestral property from the laws of the Tamils.

MUDUSAM UNDER THE OLD THESAWALAMAI

The Thesawalamai Code says: "From ancient times all that goods brought together in marriage by such husband or wife have from the beginning been distinguished by the denomination of *mudusam* or hereditary property,

when brought by the husband and when brought by the wife were dominated in the Tamil language *chidenam* or by us dowry It is rather unfortunate that a correct legal terminology was not adopted by the framers of the Code. The term "goods" is only used in modern law to connote movables, but in the context it means both movables and immovables. Further, the term "hereditary property" is used as if it is synonymous with *mudusam*. In general, *mudusam* property connotes hereditary property. Hereditary property is property which a person inherits from his parents. Under the early law the sons inherited their father's property and the daughters were given a dowry out of the mother's property. This is evident from the Thesawalamai Code which says: "On the death of the father all the goods brought in marriage by him should be inherited by the son or sons and when a daughter or daughters married they should each receive dowry or *chidenam* from their mother's property; so that invariably the husband's property remains with the male heirs and the wife's property with the female heirs but the acquisition or *thediatettam* should be divided among the sons and daughters alike: the sons, however, must always permit that any increase should fall to the daughter's share."

Thus, it is clear that under the early law, hereditary property of a person comprised the father's separate property and half of the father's acquired property. If there were daughters, the whole of the mother's property was given to the daughters as dowry. If there were no daughters, then hereditary property consisted of the separate property of the father, mother and the acquired property of both. Later, we are told that in process of time, and in consequence of several changes by Government, particularly those in the Portuguese era, several alterations were gradually made in these customs and usages according to the testimony of the older Mudaliyars. Dowry was taken indiscriminately from the dowry property of the mother, the hereditary property of the father or from the acquired property of both.¹

Mudusam property consists of hereditary property and does not in any way include property which a person has not inherited from his parents or relations. So long as the parents were alive, what ever the son acquired belonged to the parents.²

1. Thes. Code 1-2.
2. Thes. Code 1,7.

In view of these observations, the statement of the law on this subject by Kantawala requires correction¹, Kantawala says: "under the Thesawalamai, marriage and not birth formed the turning point in an individual's life... Different kinds of property were therefore recognised from the nature in which they were brought together at the nuptial hour. Brides and bridegrooms, while linking themselves together by the holy knot, brought into the common pool, separate properties which retained their distinguishing characteristics in later times. Their bodies became united, their blood got mixed up, but their earthly belongings, their properties, movables and immovables which formed the beginnings of their future household were recognised as distinct and divided."

Under the old Thesawalamai, all property was divided into three classes, viz:- (1) *Mudusam* or hereditary property brought into the family by the husband; (2) *Chidenam* or dowry brought into the family by the wife; and (3) *Thediatettam* or acquisition, being profits accruing to either husband or wife during marriage.² "Kantawala seems to conclude that there were only these three kinds of property, recognised by the law of Thesawalamai. We have formulated the existence of a fourth class of property conveniently termed the "residuary property." He also seems to suggest that any property brought by the spouses at the nuptial hour which did not come under the category of dowry or acquired property should be called *mudusam* property—a conclusion which has been shown to be erroneous.

If lands were purchased after marriage with the moneys forming the hereditary property, the lands come under the description of *mudusam* under the old Thesawalamai.³ In case of *Jivaratnam v. Murukesu*,⁴ it was decided that "under the law of Thesawalamai, money inherited by a husband and converted into lands does not form part of *thediatettam*. Such land should be treated as his separate property provided that the money can be earmarked". Browne, J., said⁵: "The precedents cited by the Solicitor-General from pages 182 and 267 of Muttukrishna certainly show that investments or transmutation of the character of the property will not affect the rights which belonged to it in its original character". In the converse case, when a person sold

1. Kantawala: Thesis on Thesawalamai, p. 17.
2. Kantawala, pp. 17 - 18
3. M. 33
4. 1 N.L.R. 251, 1895
5. 1 N.L.R., at 255.

mudusam property and retained the money or bought a new property, such property was deemed to be hereditary property under the old Thesawalamai.¹

MUDUSAM UNDER THE JAFFNA MATRIMONIAL RIGHTS AND INHERITANCE ORDINANCE

What is "Mudusam"

The Jaffna Matrimonial Rights and Inheritance Ordinance (Cap.48) divided hereditary property into *mudusam* and *urumai*. *Mudusam* is defined as patrimonial inheritance, being property devolving on a person by descent at the death of his or her parent or any other ancestor in the ascending line.² Succession is taken as testate when a property is left by will and intestate when property devolves according to the rules of intestate succession.³

Urumai is defined as non-patrimonial inheritance, being property devolving on a person by descent at the death of a relative other than a parent or an ancestor in the ascending line.⁴ Property received by any person from a father or any of his collateral relations whether in *urumai* or *mudusam*, ascendants or dowry, legacy or donation or in a manner other than for pecuniary consideration from a father is known as "property derived from the father's side"; and property derived from the mother's side whether as *mudusam* or *urumai* dowry, legacy or donation is known as "property derived from the mother's side."

As stated earlier, if a person sold *mudusam* or *urumai* property and bought a new property during coverture, under the old law, it still retained its old character. But in *Sellachy v. Visuwanathan Chetty*,⁵ a Divisional Court, interpreting section 19 of Ordinance, No. 1 of 1911, took the view that all properties acquired for valuable consideration during coverture are *thediatettam* or acquired property.⁶ Therefore, if *mudusam* or *urumai* property is sold and a new property was acquired

1. Regarding persons governed by Ord., No.1 of 1911.
2. Section 15, Cap. 48.
3. Section 15, Cap. 48.
4. Section 16, Cap. 48.
5. 23 N.L.R. 97
6. For a fuller discussion. Post, see Chapter xiii

during coverture it has to be considered as *thediatettam* Ordinance, No.58 of 1947 which amends the law has restored the old view.¹

The Right of Replacement

The *mudusam* property of the husband is regarded as the separate property of the husband, so that if this property in any way dwindled during coverture, it had to be made good out of the acquired property of the husband. The Code states: "If hereditary property was diminished during marriage, when the husband dies and the property is divided, whatsoever hereditary property that was lost must be replaced from the acquired property. If the acquired property was not sufficient then the heirs of the husband had to bear the loss. On the other hand, if the husband's property was considerably increased, the wife's heirs at the death of the husband were not in a position to claim any compensation."²

The question may arise as to whether the Jaffna Matrimonial Rights and Inheritance Ordinance³ has changed the law regarding this matter. The Ordinance only deals with the devolution of property in this case of intestacy, and it is therefore submitted that the right of replacement and the disability of the wife's heirs to claim compensation for improvements made to the husband's property are in no way affected. The law governing the devolution of *mudusam* property on intestacy is dealt with later.

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1. See Post, Chapter xiv
 2. Thes. Code I. 16.
 3. Cap.48.

CHAPTER XII

DOWRY PROPERTY (CHIDENAM)

THE ORIGIN OF DOWRY OR CHIDENAM

In view of the fact that the word "chidenam" is derived from the Sanskrit word "stridhana," many writers have erroneously come to the conclusion that the law relating to *chidenam* is taken from the Hindu Law. Mr. Kantawala commits this error. He says:¹ "The *chidenam* is undoubtedly the Sanskrit *stridhana* of the Hindu Aryan Law. Yajnavalkya in 85th verse says: 'Swatantram Na Kwichin Striyah', meaning, Women can have no independence'; and thus the law came to be, that a wife could hold no separate property; but the evils of the joint family system brought into greater prominence the hardships connected with this stringent rule, especially when the time came for partitioning the joint property and the law of *stridhana* gradually evolved, by which the peculiar property of the women could not be parceled out among the Co-owners.

Anyone who is conversant with the principles governing the law of *chidenam* in the Thesawalamai will be struck by the fundamental differences between these and the incidents of the Hindu Law of *stridhana*. The institution of dowry and the peculiar incidents of *chidenam* must be attributed not to influence of Hindu Law but to the matriarchal system of society that prevailed among the Tamils and under the Marumakattayam Law, as has been ably shown by the researches of the late V. Coomaraswamy.² After stating that the Tamils passed through a matriarchal to a patriarchal system and after a brief discussion of the essential of the Hindu Law of *Stridhana* he says:

"The Hindu Law started with the idea that a woman is not entitled to hold property at all and subsequently conceded a limited right of enjoyment during her lifetime in the substantial portion of her property and those over which she was given full right of disposal are but an insignificant portion. Whereas, the Thesawalamai, even so late as the time of the Dutch codification, lays down a rather astounding principle that sons should not claim anything from the property of their parents until the last daughter is dowried".

"We have heard the often-repeated proverb peculiar to Jaffna Aru penpettal arasunum andiyavan" which when translated so as to bring out its true import means that "even the wealthiest man is reduced to the position of a pauper by the time he dowries his sixth daughter," as all his patrimony or wealth will be exhausted in apportioning the six dowries. Issueless females are not excluded and powers of alienation are the same for the male and the female. Religious or spiritual benefit does not come into play in the law of inheritance in Jaffna. The sons and daughters, even those dowried, if they are prepared to come into hotch potch, according to the present law are treated alike.... Then arises the question why is there such a wide difference between the Stridhana Law of India and that of Jaffna? The answer to the question is that the latter is an adaptation of the matriarchal system of succession which was in vogue among the Tamils in their primitive stages of social development".¹

Before dealing with the theory propounded by Mr. Coomaraswamy regarding the origin of *chidenam* it will be necessary to state the fundamental principles of Marumakattayam Law pertaining to the family unit known as *Tarwad*. The matriarchal system of society prevailing among the Malabars of India is well-known to all students of Marumakattayam Law. In Marumakattayam Law the term "Tavazhi" (mother's side when used in relation to a female meant the group consisting of that female, her children and her descendants, when used in relation to a man it stood for the Tavzhi of the mother of that male. Thus, neither the wife nor the children of the male belong to the Tavazhi. The *Tarwad* means the group of persons forming a joint family with community of property, governed by the Marumakattayam Law of Inheritance. "A Malayalie Tarwad," says Mr. Logan in his Malabar District Manual, "corresponds pretty clearly to what the Romans called a *gens*, with this important distinction, however, that whereas in Rome all the mem-

1. Kantawala, Thesis on Thesawalamai, p. 20

2. See the Hindu Organ, dated 2nd August, 1933, and 6th July, 1933.

1. See article by V. Coomaraswamy, Proctor S.C., Thesawalamai 131 Hindu Organ, dated 3rd August, 1933.

bers of the *gens* traced their descent in the male line from a common ancestor, the members of *Tarwad* trace their descent in the female line from a common ancestor. A *Tarwad* may consist of several *Tavashis* having community of property. All the members of a *Tarwad* have community of property though all the members of a *Tavazhi* need not have it.¹ The eldest male member of the *Tarwad* is called the *Karnavan* and is the manager of the property.² Other members of the *Tarwad* are called "*Andravans*." Thus, it is clear that *Tarwad* is the same as the joint family of the Hindu Law with certain fundamental differences. In a *Tarwad*, only the female and her descendants are included. Neither party to a marriage (*sambandam*), become a member of the other family. The offspring of the union belong to the mother's *Tarwad* and have no claim to any share in the father's property. All members of the *Tarwad* were entitled to maintenance. According to the old Marumakattayam Law the *Tarwad* property was impartible.

Where families become numerous, joint possession became troublesome and often by common consent properties were divided and a single *Tarwad* was split up into several *Tarwad*. If all the members of a *Tarwad* become extinct the members of the connected *Tarwad* become the heirs, as in the case of the *gens* in Roman Law. A practice grew up among the wealthier classes for the husband or father to provide for a separate home out of his separate self-acquired property for his wife and children. This new household became a separate branch, a *thavashi illam* of the original *Tarwad*, but retained the community of property with the *Tarwad* from which the *Illam* branched off.³ In the *taivazhi Illam*, as in the original *Tarwad*, the inheritance descends in the female line.

With these preliminary observations we shall consider the theory of the late Mr. V. Coomaraswamy regarding the origin of the dowry system. According to him the dowry system is the relic of Marumakattayam Law. He says:⁴ "In Jaffna where nature smiles but grudgingly to the toil and moil of the agriculturist and the economic conditions are less favourable than in Malabar, where individuals and single families had to struggle each for his or her or its own existence it is hardly possible to imagine that communities

1. See Nair's Madras Marumakattayam Act, p.49.

2. Nair, p.6.

3. Nair, p.13,14.

4. See Article on Thesawalamai and its origin, Hindu Organ, dated 21st December, 1933, p.4

or even groups of families condescended to pool their resources together or tolerated the retaining of communal purse, and looked up for their feeding and clothing to the senior member of the community or group of families descended from a common ancestor. On the other hand, the tendency must have been from the very beginning for the community to split up into a smaller group of families deriving community of property and interest not extending beyond two or three generations. But the idea of community of property at least on a small scale is clearly discernible in some of the provisions of Thesawalamai as it has come down to us. I shall deal with these later in greater detail. I shall content myself with stating for the present that the dowry system as it has existed in Jaffna for centuries together is a typical relic of the Marumakattayam Law introduced into Jaffna by its earlier Malabar settlers. One of the fundamental principles of Thesawalamai Law as administered in Jaffna till very recently is that females succeeded females, daughters succeeded to their mother's property and dowried sisters succeeded to a dowried sister. These are isolated concrete applications of the general principles of property descending in the female line from generation to generation. This is a principle suitable to Jaffna conditions.

I have already pointed out in my exposition of the Malabar system that in the Royal household and influential families it was the practice in Malabar for the husband or the fathers of some members of *Tarwad* to provide separate branch *Tarwad* known as *tavazhi Illam*. This customary mode of holding joint family property, as occasion arose, was suitable to the economic conditions of Jaffna. The early settlers from Malabar, perhaps adopted this mode of tenure of their self-acquired property as the most practical custom to perpetuate such properties in their families for future generations.

When, therefore, a daughter of the early settlers married, she was, according to the custom that prevailed among them in their former place of abode, Malabar, provided with a separate house or a distinct share in the parental house, other landed property, implements of husbandry, household utensils, jewellery etc., suitable to her station in life. This is the origin of the Jaffna dowry system; that is, to use the phraseology of the Malabar Law, "the daughter starts the branching off of a *Tarwad* (parents' communal property) into a *Tarvazhi Illam* with her husband as its *Karnavan*." Viewed in this way each of the dowried daughters in a family may be considered a separate *Taivazhi Illam* branch of the parental *Tarwad* property. The rule of the law of Thesawalamai of a dowried sister inheriting the properties of another dowried

sister dying issueless to the exclusion of her brother can be explained only by the principles of Marumakattayam Law, in which as I have indicated above, one branch of *Taivazhi Illam* succeeds to another *Taivazhi Illam* which becomes extinct by its last member dying issueless.

Similarly, the right of a surviving husband to settle upon his daughter by way of dowry any portion of his deceased wife's property (and to this the highest tribunal in Ceylon has given legal sanction even in recent times) rests upon the theory of a community of property of *Taivazhi Illam* over which the Karnavan had the right of disposal."

It is submitted that this theory explains many of the peculiar incidents governing the law of *chidenam*, and accounts for the gulf that exists between the law of *chidenam* in Thesawalamai and the Hindu Law of *Stridhana*.

CHIDENAM PROPERTY

The Thesawalamai Code says: "From ancient times all the goods brought together in marriage by such husband and wife have from the beginning been distinguished by the denomination of *mudusam* or hereditary property, when brought by the husband, and property brought by the wife was called in the Tamil language *chidenam*, or by us dowry."¹ Any purchase made during marriage is regarded as acquired property. But if the purchase was made with dowry moneys, under the old law, the property so acquired was regarded as dowry property.² After Ordinance, No. 1 of 1911 came into operation the position appears to have become different till Ordinance, No. 58 of 1947 restored the old law. A donation is not the same as dowry.³ Dowry is always given to a woman who contracts a regular marriage and not a woman who lives in concubinage.⁴

Under the old law, dowry was given out of the property belonging to the mother in accordance with the rule "females inherit the property of their mother and males that of their father."⁵ As shown earlier, later on the dowry

1. Thes. Code 1. 1.

2. M. 143.

3. M. 132.

4. M. 121.

5. Thes. Code 1.1

DOWRY PROPERTY (CHIDENAM)

was taken indiscriminately, from the husband's or wife's property or from the acquisition of both.¹

PERSONS WHO COULD GRANT A DOWRY

Though, the father has the undoubted right during coverture, to grant a dowry of any property belonging to the spouses does he retain this right even after the wife's death? This question was considered by the Supreme Court in a number of cases. In the case of *Nagaratnam v. Alagaratnam*² it was contended that once the wife dies the husband did not have the power of giving her dowry property as dowry to his daughters. Van Langenberg, A.J., in holding that the husband could grant as dowry such property even after the death of his wife says: I agree with the learned District Judge that under the Thesawalamai, the husband has a right to allot as dowry to his daughter such portions of the dowry property of his deceased wife as he may think fit. Under sub-section (9) a similar right is given to the wife who survives her husband. It was pressed upon us by counsel for appellant that Edward Spaulding by reason of his second marriage had lost whatever right he may have had to deal with his wife's property. I do not think that the second marriage altered the position. Sub-section 11 no doubt states that where a father marries a second time and the nearest relation takes charge of the children, he "is obliged to give at the same time with his child or children the whole of the property brought in marriage by his deceased wife and the half of the property acquired during his first marriage" but the duty is still cast on him to give his daughter out of this property a dowry when she marries"³

In *Thambipillai et al v V. Chinnathamby*⁴ the decision in *Nagaratnam v Alagaratnam*⁵ was followed. De Sampayo, J., in delivering his judgement, says.⁶ "But it is contended⁷ that, since on the death of a parent the children at once inherit the deceased's property, the surviving parent cannot give out of the deceased's property anything more than the daughter's own share of inheritance, for otherwise the shares already vested by law in the other children would be taken away from them. This, I think, involves a misconception of the principle underlying the provisions of the Thesawalamai in question. That principle appears to me to be similar to the Hindu idea of "undivided family". The administration of the entire estate is in the sole control of the

1. Thes. CODE 1.2

2. 14 N.L.R.60

3. 14 N.L.R.at 64

4. 18 N.L.R. 348

5. 14 N.L.R.60

6. 18 N.L.R. 351

7. See 2 Bal. 141

parent, who has the power to apportion such part of the deceased parent's property to the daughters in respect of dowry as he or she in his or her discretion thinks proper, and to possess the balance of the deceased parent's property, if any, until the sons grow up and are competent to administer the same. When the surviving parent is the father, clause 11 of section 1 of the Thesawalamai states the matter too clearly to admit of any difficulty. For, after laying down that the father should furnish the dowry of the daughters out of the deceased mothers property, the acquired property of both, and his own inherited property, if provides as follows: "This being done, and if anything remains (of the mother's property), and if the son or sons have acquired a competent age to administer what remains, then they take and possess the same, without dividing it until they marry..... But should there remain nothing of the mother's property and of the (mother's) half of the property acquired during marriage the sons, whether young men or married, must do as well as they can until their father dies". I have italicized the above words in order to emphasize the fact it is within the power of the father to give the whole of the deceased brother's property as dowry to the daughters and thus to deprive the sons of any share."

After the death of the father could it be said that the mother has a similar right? The point is not free from difficulty. In *Murugesu v. Vairaran*¹ this question as answered in the negative. Monicrieff, A.C.J. in delivering judgement said² "The Solicitor General who supported the affirmative quoted a case from Muthukrishna, page 158, in which the father having given by way of dowry to his daughter 2/3 (divided) of his land and the matter having gone into Court at the instance of his son, the decision of the Court went against the son. After the father's death, the son, again disputed his father's right to give a divided portion by way of dowry, but the Court held with the assessors that the father had the right to do what he had done. But in this case the father is dead and the mother is entitled to a life-interest in the property. It is argued that she being bound in terms of section 9 of the Thesawalamai to give her daughter a dowry succeeds to the whole of the duty and power of the father. It may be so, but I think that the authority is hardly sufficient to persuade me that the mother having life-interest in the property, although she has the duty to give a dowry to her daughter imposed upon her has the power to divide the land. At the same time I see no reason why she should not be at liberty to the extent of her life-interest to deal with the property as se

1. 1904, 2 Bal. Rep 141

2. 2 Bal. Rep. 143

pleases within reason". Thus, the view was expressed in this case that if the mother gives as dowry the share belonging to her husband, she only transfers her life-interest, the title remaining in the heirs.

A different conclusion was arrived at by Garvin, J., in the case of *Sinnthangchy v Poopathy*.¹ He said "It is to be gathered from rule 9, section 1, of the Thesawalamai, as it appears on Page 5 of Volume 1 of the Ordinance that upon the death of a man leaving children and a widow, their mother, his property remains with the mother in whom is vested the right to apply that property or any part thereof in giving a dowry or dowries to their daughters on marriage. The son or sons take nothing so long as the mother remains alive. It is impossible to say, therefore, that in this case at the death of the deceased, Ambalavanar Ponnampalam, his property devolved upon his son and daughter or that it devolved in any particular portion. All that is clear is that the property remained with the widow and that she had the right to apply the property or so much of it as she thought necessary in giving her daughter a dowry. The son, no doubt, had the right to take what was left, but even that right was suspended until the death of the widow. The view of the law to which I have just given expression derives support from the judgments in *Nagaratnam v. Alagaratnam*² and *Thambapillai v. Chinnatamby*.³

In the above case, the parties were married in 1893, long before Ordinance No.1 of 1911 came into operation. If the spouses had been married after Ordinance 1 of 1911 came into operation, the question may be asked whether it is competent for one spouse to give by way of dowry the property of the deceased spouse. In the case cited earlier Garvin, J., in an *obiter dictum* answered the question in the negative. He said⁴ "It is evident that this order proceeded upon the impression that immediately upon the death of the deceased his property devolved upon his daughter, the first respondent, and his son, the second respondent, in certain definite proportions. In this, I think, the learned District Judge was mistaken. The position under the Thesawalamai is by no means the position which has been created since the new Thesawalamai Ordinance No.1 of 1911 was passed." In this dictum the learned Judge seems to indicate that after Ordinance No.1 of 1911 came into operation the property of the deceased spouse devolves on the children, and,

1. 1934, 36 N.L.R. 103 at 104.

2. 14 N.L.R. 60.

3. 18 N.L.R. 348.

4. 36 N.L.R. 104.

therefore, the surviving spouse has no power to grant as dowry any portion that has devolved on the children to a particular daughter.

It is submitted with respect that the conclusion arrived at by the learned Judge is a *non sequitur*. As Hohfeld points out a power must be distinguished from a right. Many instances may be given whereby a person may be given the power to deal with properties the dominium of which are vested in another person. Hence, though after Ordinance No.1 of 1911 came into operation, the property of the deceased spouse may vest in the heirs, yet if the surviving parent is given the power to deal with such properties, it cannot be said that such spouse cannot give as dowry any property belonging to the deceased spouse. Even under the old Thesawalamai, when one spouse died, the property of the deceased spouse vested in his or her heirs.¹ But the surviving spouse as manager of the joint estate had certain powers. It is submitted that there is nothing in the provisions of Ordinance No.1 of 1911 which takes away the power of the surviving spouse to give the property of the deceased spouse to any daughter as dowry. It is only those provisions of the Thesawalamai Code which are inconsistent with the provisions of Ordinance No.1 of 1911, that are repealed by implication.² A similar view was expressed by the Sampayo, J., in *Thambapillai v. Chinnathamby*.³ He said "the whole passage and various other characteristic provisions of the Thesawalamai show that there is no such thing as a vested right by inheritance, and that, even if such language is permissible, the children can be divested of that right at the will of the parent." Thus we see that de Sampayo, J., although he does not take the view that under the old Thesawalamai, on the death of spouse, property of such spouse vests in the children, yet goes on to say that even if that view is permissible (which it is submitted is the correct view) yet the surviving parent has the power to give such property as a dowry to any daughter. This question awaits an authoritative decision.

If both the parents are dead, could it be said in view of the provisions of the Thesawalamai Code the nearest relative has the power to give dowry out of the property belonging to the deceased parent? The Thesawalamai Code says:⁴ "If the father and mother died without being married more than once, and their surviving children are infants under age the relations of both sides

1. See 1863 Leg. Miscell. 25; M.404.

2. See Section 40 of Cap. 38.

3. 18 N.L.R. 352.

4. Thes. Code 1. 12.

assemble to consult to whose care the children are to be entrusted, and a person being chosen the children are delivered to him together with the whole property left by the parents which remains with such person until they attain a competent age to marry, and when they are grown up it is to be supposed that it will be the turn of the eldest first to marry, when the friends must again assemble to consult what part of his or her parent's property should be given to him or her as dowry, with which he or she must be content. In the case of *Valliammaipillai v. Ponnambalam*⁵ it was contended that when both the parents are dead the relations of the children can apportion any part of the property which belonged to the parents as dowry to any of the female children. Mocrieff, C.J., took the view that the relations have no power to pass title when they attempt to apportion certain portions as dowry to one of the female children. In delivering judgment Moncrieff, C.J., says: "But it appears to me that those friends who assembled, although they are given the power to apportion part of the parent's property and to give, for example, to a daughter her dowry, had no right or power to pass title in property in which they have no interest." This decision may be further supported on the ground that the provisions contained in Part 1, clause 3, of the Thesawalamai Code are partly repealed by the Civil Procedure Code and partly obsolete. Nothing in the Code prevents a relation from giving as dowry his own property or to augment the dowry given by the parents.²

THE TIME WITH DOWRY IS GIVEN

Under the law of Thesawalamai dowry may be given at any time before marriage. It may be given even when no marriage is in contemplation,³ or even after marriage. Hence, dowry property under the Thesawalamai must be distinguished from property granted by a deed of dowry. Our Courts have held that the term "consideration" in the Registration of Deeds Ordinance must be given the same meaning as in English Law. In such cases the dowry should be given as a *quid pro quo* to consummate the marriage,⁵ but under the Thesawalamai the term dowry has a different connotation.

1. 2 Br. at 236.

2. M.169. Part 1, Clause 3.

3. See *Thambapillai, et al v. Chinnathamby, et al*, 1915, 18 N.L.R. 350

4. 4 Tamb. 176 F.B, See also Thesawalamai Code.

5. See Jayawardene or Registration of Deeds, p. 110.

POSSESSION OF DOWRY PROPERTY

In the same time of the Tamil kings the maxim was *ottiyum chedenamum patiyal*: that is to say, you must take immediate possession of an *ottied* property or a *chidenam* property.¹ If such possession is not taken within the prescribed time, the property reverts to the common estate, unless the couple can produce authority from the parents for the delay in taking possession.² After the prescription Ordinance³ came into operation, the law appears to have been changed and now, unless another person possesses the land for ten years uninterruptedly by title adverse to and independent of the grantee of the dowry, the latter cannot be deprived of her title, provided the grant of the dowry is notarially executed in the case of immovables.

FORM OF A DOWRY DEED

Under the early law dowry of lands could be given by parole agreement.⁴ Later, a deed known as the *doty* deed was drawn up containing the grant of dowry. After the Prevention of Frauds Ordinance⁵ came into operation, if dowry lands or any interests in lands are transferred, the transfer must be notarially attested.⁶ If the dowry properties are not actually transferred but there is only an agreement to transfer the immovable properties at a future period, there is a conflict of opinion as to whether the agreement should be notarial or not. The earlier view was that such an agreement should be notarially attested.⁷ The later view is that it need not be notarially attested, as such an agreement did not fall within the purview of the provisions of the prevention of Frauds Ordinance.⁸ If the properties are movables, in view of the provisions of the Registration of Documents Ordinance, in order to effect the transfer, either there must be delivery of the movables or the agreement must be contained in a Bill of Sale duly registered within 21 days.⁹

1. M. 342

2. Kantawala 25.

3. Cap. 55.

4. *Colender v. Vyraven*, M. 136.

5. Cap. 57.

6. Section 2 of the Prevention of Frauds Ordinance, Cap. No. 7 of 1840.

7. See *Levvai v. Pakeer Tamby*, 6 Bal. Notes on Cases 46, and *Perera v. Abeyadeera*, Matara Cases 112

8. *Tamby Lebbe v. Jamaldeen*, 1937, 39 N.L.R. 73 and *Lila Umma v. Mafeed*, 1943, 44 N.L.R. 524.

9. See Registration of Documents Ordinance, Cap. 101

If the agreement is to transfer the movables at a later date such an agreement is binding between the parties though entered into orally. But if the movables have been transferred for valuable consideration to a *bona fide* purchaser the latter gets good title in view of the principle *mobilia non habent sequelam* and of the provisions of the Sales of Goods Ordinance.⁹

THE RIGHTS AND OBLIGATIONS OF THE PARENTS IN RESPECT OF DOWRY PROPERTY

It is the duty of the parents to give dowry to their daughter. Under the old Thesawalamai if the dowry property was sold by decree of Court against the parents they must make good the loss by giving something out of their property to compensate for the loss. It is stated in the Thesawalamai Code that "the parents who gave the same (and after their decease, the sons) are obliged to make good the loss of the land, garden or slaves, etc., for a well drawn up and executed *doty ola* must take effect, because it is by this means that most of the girls obtain husbands, as it is not for the girls but for the property that most of the men marry. Therefore, the dowry they lose in the manner above stated must be made good to them either in kind or with the value thereof in money." It may be noted in passing that this baneful system of providing dowries is slowly dying out and should one day be rooted out completely if a prosperous and happier race is to be perpetuated. It is encouraging to note that these provisions are obsolete and there is now no legal obligation, on the part of the parents to provide a dowry for their daughters. The Code also states "should it happen that after the marriage of the daughter or daughters the parents prosper considerably, the daughters are at liberty to induce their parents to increase the *doty* which the parents have an undoubted right to do." It is left to the discretion of the parents to augment the dowry already given if they are in affluent circumstances. If they are in indigent circumstances, under the old law the father is not given any right but the mother, if she happens to be a widow, is given a life-interest in certain circumstances stated below. The Thesawalamai Code says:¹ "Although it has been stated that where a sister dies without issue the dowry obtained by her from her parent devolves to her other sister or sisters, yet if it sometimes happens that her mother, having in the meantime become a widow and poor, requests the sister or sisters of the deceased to allow her to take possession of the property of her deceased daughter and to keep the same so long as she

1. Cap. 70

2. Thes. Code 1.6.

lives, to which they sometimes agree, but are by no means bound to do it; but in order that they may not subject themselves to any loss they ought to have the property described and registered; otherwise, on the mother's death, the son or sons will come and take possession. The mother cannot demand this as a matter of right, but if the other surviving daughters agree then they enter into a deed which described the property so given and embodying the terms of agreement. The rights and obligations of the parties to the deed were governed by the provisions of the deed itself."

RIGHTS AND OBLIGATIONS OF THE SPOUSES INTER SE IN RESPECT OF DOWRY PROPERTY

The dowry property is considered as the separate property of the wife. Under the old Thesawalamai Code, it was not liable for the husband's debt¹ nor were the rents and profits of the dowry property liable to seizure for a debt of the husband.² Under the Jaffna Matrimonial Rights and Inheritance Ordinance, *thediatettam* has been defined to include "profits arising during the subsistence of marriage from the property of any husband or wife," and therefore rents and profits from dowry property will be liable to seizure for the husband's debt, although the dowry property itself not liable.

If the husband squanders the dowry and the dowry is diminished during marriage, the same must be made good from the acquired property of the husband when the wife dies and the property is divided.³ If it is not possible to do this from the acquired property, it is said that the person who suffers the loss must put up with it.⁴ If it was the wife who squandered the dowry property, then the loss need not be made good out of the husband's half of his acquired property.⁵ If the wife's or husband's property was considerably improved, the husband's heirs or wife's heirs respectively on his or her death cannot claim the expenses incurred in improving it.⁶

The husband, not being the owner of the dowry property, cannot alienate, lease or mortgage it but the wife can do so. If the wife wishes to deal with her immovable property she must get the concurrence of her husband.

1. *Colander v. Vyran*, 1855, M.136.

2. *Marshall*, 1194, 222.

3. *Thes. Code* 1, 15.

4. *Thes. Code* 1, 14 *Mudalitamby v. Sithamparapillai*, M. 121.

5. *Thes. Code* 1, 15 *Mudalitamby v. Sithamparapillai*, 182, M. 121.

6. *Thes. Code* 1, 16.

(*Chellappa v. Kumaraswami*).⁷ This aspect has been discussed earlier. Even after the wife's death, as stated earlier, the husband has certain powers over the dowry property.

THE LAW GOVERNING DOWRY AFTER THE JAFFNA MATRIMONIAL RIGHTS AND INHERITANCE ORDINANCE CAME INTO OPERATION

Under the Jaffna Matrimonial Rights and Inheritance Ordinance the distinctions between *mudusam*, *urumai* and dowry are still preserved. The provisions of the old Code dealing with dowry, which are not inconsistent with the provisions of Ordinance No.1 of 1911, still apply. The provisions governing the devolution of dowry property on intestacy which are inconsistent with the provisions of Ordinance No.1 of 1911 have been repealed by implication.

1. 18 N.L.R. 435.

CHAPTER XIII

THE THEDIATETTAM (ACQUIRED PROPERTY)

The Law of Thediatettam After the Jaffna Matrimonial Rights and Inheritance Amendment Ordinance of 1947

The concept of Thediatettam was radically changed by the amendment to the Matrimonial Rights and Inheritance Ordinance, Jaffna of 1947. The changes may be summarised as follows.

1. Property converted cannot be regarded as property acquired; therefore, if the wife's dowry or Mudusam property was sold and a new property was bought during the subsistence of the marriage, after the amendment came into force, it still remains her property and was not regarded as Thediatettam. Similarly, if the husband's Mudusam or separate property was sold and a new property was bought after this amendment came into force, it remained his property and not Thediatettam.
2. After this amendment came into force, property acquired by a spouse was his or her Thediatettam and half did not vest on acquisition but if it was undisposed of on death, the other spouse became an heir to half.

This view was correctly stated by Gratiaen J. in *Kumaraswamy v. Subramaniam*.¹ His view was confirmed by the Privy Council in *Subramaniam vs. Kadirgamar*,² but *Sharvananda C.J.*, in an obiter dictum,

¹ 1156 NLR 44 at 47

² 72 NLR 289

criticised, the interpretation placed by Gratiaen J., in a recent case,¹ where to be took the view that despite the repeal of sections 19 and 20 of Ordinance 1 of 1911 and the clear wording of the Amending Ordinance the changes brought about in Thesawalamai by the Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 1 of 1911 as amended by Ordinance No. 58 of 1947 (Sections 19 & 20) have brought about changes in the law of Thesawalamai. He therefore sought to correct an erroneous view set out by Garvin J., in *Avitchy's case*, that any property acquired by a spouse during the subsistence of the marriage would be acquired property, and restored the more correct view that property converted is not acquired property. Any property acquired after the amendment came into operation could only be acquired property if it was not converted from either Mudusam or dowry property of either spouse into a new property being acquired during the subsistence of the marriage as Thediatettam.

This concept is made clear in the amending enactment which states that the Thediatettam of each spouse is the property of the spouse who acquired it and even alienated it during his or her lifetime; the other spouse became an heir to half of the property. This was not the law before. The law of Thediatettam under Ordinance No. 1 of 1911 is defined in Sections 19 and 20 of the Ordinance. It enacts that although property is acquired in the name of one spouse, it is the common property of the other spouse. Interpreting these provisions, there are many decisions of our Courts culminating in the decision of the Privy Council that the acquisitions by one spouse of Thediatettam property in his name, the other half automatically rests in the other spouse. This provision has been changed by the amending Ordinance which repeals Sections 19 and 20 and makes it clear that any property acquired by one spouse after this Amending Ordinance came into force is the acquired property of the spouse who acquired it in his or her own name. The position is made clearer when sections 19 and 20 of the old Ordinance were repealed and it was categorically stated that on the death of the acquiring spouse, if property had not been alienated, the other spouse became heir to half of the deceased spouse's property.

1. [1986] 2 Sri LR. P. 8

Interpreting these provisions, Gratiaen J. in *Kandasamy v Subaramaniam*,¹ took the view that the Amending Ordinance contains the comprehensive definition of Thediatettam and vests such property only in the acquiring spouse and, if not alienated by him or her, the other half devolves on intestacy to the other spouse as heir. But in *Manikkavasagar v. Kandasamy and others*,² Sharvananda C.J. appears to have taken a different view from Gratiaen J's interpretation of the vital elements of the Amending Ordinance referred to. He was of the opinion that the law governing Thediatettam was the customary law and the provision in the Ordinance of 1911 were only declaratory of the existing law and by the repeal of sections 19 and 20 by the Amending Ordinance the customary law governing Thediatettam was restored. Therefore, even after the Amending Ordinance came into force, when one spouse acquired a property during the subsistence of the marriage, the other spouse was entitled to half from the moment of acquisition. He differed from the view of the learned Judge Gratiaen, as he is of the view that the interpretation the earlier judgement has based on the Amending Ordinance. With due respect, it is not possible to agree with the view of the learned Chief Justice for the following reasons :

- (1) The law of Thediatettam ceased to be governed by custom when it was codified by the Dutch and when Sir Alexander Johnstone translated it and, with modifications, enacted it as statute law containing the regulations referred to as the Thesawalamai regulations publicised as statute law of the country in the first Volume of the collected enactments published in Ceylon.
- (2) The Jaffna Matrimonial Rights and Inheritance Ordinance improved on this definition and again contains a statutory provision defining Thediatettam as acquired property in the following manner :-
 - (a) property acquired for valuable consideration by either spouse during the subsistence of the marriage
 - (b) profits derived from the properties of either spouse during the subsistence of the marriage.

In *Thamotheram's* case, these provisions were interpreted as properties saved and not spent.

1. (1954), 56 NLR 44 at 47

2. (1986) 2 Sri L.R. Part 1, Page 8

- 3) Due to the abuse committed by some of the married men governed by Thesawalamai (who sold the dowry properties of their wives, in whose names the parents had transferred them, and with the profits bought new properties and then claimed that they were entitled to half since they became acquired property within the meaning of the definition given by the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911) there was great dissatisfaction amongst the Jaffna parents and as a result of this a Commission was appointed called the Thesawalamai Commission which dragged its feet for a long time and produced the amendments referred to, making it very clear that the property converted (either whether it was dowry property or Mudusam property) was not acquired property or Thediatettam thereby restoring the old view stated in *Ponnammah v. Nalliah* and other cases that such property was excluded from the concept of Thediatettam.
- 4) By the abolition of Sections 19 and 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance the common concept of Thediatettam property acquired in the name of one spouse was taken away. Such property vested in the name of the spouse who acquired it making it still more clear by stating that on the death of such spouse, half of the whole of that property vested in the other spouse. If the whole does not vest, how could half vest in the other spouse as an heir?

From the above analysis it is clear that the law governing acquired property is contained in statutes and not governed by custom, although it may have its origin in custom before the codification took place.

Further, there is not a single decision of our Courts which has enunciated that the Thediatettam concept is still governed by customary law.

5. To prove that custom governs a concept of law the requisites of custom such as antiquity, certainty, user from ancient times, user without disruption etc., as stated by Allan in the book "Law in the Making", must be proved. No such effort was ever made in the case decided by His Lordship the Chief Justice.

For these reasons, it is submitted that the view of Gratiaen J., is preferred to that of Sharvananda C.J.'s view which must be regarded as obiter for the reason that he has held that in the case, which he decided, there was no proof that either Thesawalamai applied to the deceased party or that the property was acquired with the separate savings or the property of either spouse during coverture. Therefore, it is submitted that it is still open for the Supreme Court (the highest Court in the Island) to adopt the more correct view expressed by Gratien J. and thereby correct its own error.

The view expressed by Gratiaen J. has many implications. Under the law as it exists, under the Matrimonial Rights and Inheritance Ordinance No. 1 of 1911, without its amendment, although the wife acquired the property in her own name, the husband, being entitled to half of it, would have the status of a Manager of the whole estate (a concept derived from the old joint family system which existed before the Dutch period) and he could sell, mortgage, or lease such property without the concurrence of his wife. He could not donate it to the immediate donee without such concurrence but strangely enough, it has been held that if such a donee sells for valuable consideration, the wife could only be entitled to compensation and could not claim such a property. The law on this subject is governed by case law and has been discussed earlier. All these propositions governing Thediatettam have been swept away by the Amending Ordinance since if the wife acquired such property the title is in her and in the absence of any statutory provision empowering the husband to transfer property over which he has no title, except with the concurrence of the wife who is also made a party, he cannot sell, mortgage lease or even donate such property during coverture or even will his property since it is not his own. The wife, however, when the owner of such property, could alienate it but due to statutory provision that she must get the written consent of her husband, such alienation is null and void in view of the decisions in force. But nothing prevents her from transferring by will and since the will operates on her death she does not die intestate for half such property to devolve on her husband. This is an important aspect which has to be considered by our lawyers, jurists and Courts in future.

Insurance

The Thesawalamai as it was enacted by the regulations and subsequently followed by Ordinance No. 1 of 1911 was intended to govern

THE THEDIATETTAM (ACQUIRED PROPERTY)

agricultural communities and therefore govern movable and immovable property acquired by the spouses. With the advance of civilisation and new types of property coming into existence, our Courts have to consider whether such properties came under the category of Thediatettam. One such property is moneys paid on insurance policies.

To govern such property, statutory provision was made by Section 11 of the Jaffna Matrimonial Rights Inheritance Ordinance (formerly Chapter 48) which enacted that the effect of a policy of insurance by a spouse on his or her own life or the life of his or her husband, as the case may be, for his or her separate use and the payment and benefits therefrom, as expressed on the face of it to be so effected, shall ensure accordingly. Similarly under Section 12¹ a policy of insurance, before or after the commission of the Ordinance, by any married man on his own life expressed from the face of it to be for the benefit of his wife or his wife and children or any of them shall be and is deemed a Trust for the benefit of his wife for her separate use and his children and/or any of them according to the interests so expressed and shall not, so long as any object of this trust remains, be subject to the control of the husband or form part of his estate. It was provided that if it was proved that the policy was effected and premium paid by the husband with intent to defraud his creditors they shall be entitled to receive out of this sum, so secured, an amount equal to the premium so paid.

Section 7 enacts -

"any movable or immovable property to which any husband married after the ordinance will be entitled except in the case of Thediatettam shall be subject and without prejudice to any such trust shall have full power of dealing with such property."

In short, if either spouse in the insurance policy has made it clear that the policy is for the benefit of the other spouse or children then the insurance company will, on the maturity of the policy, hold it in trust for the beneficiary, except where the person who insures commits a fraud and deprives his creditors who could then lay a claim against the *premia* paid.

Very often spouses without reference to any Trust take out a policy of insurance in his or her name and pay the premiums and when the policy

1. Old cap. 48

matures the question arises as to whether it could be regarded as the acquired property of the spouse.

Difficult questions arise in determining whether moneys paid on an insurance policy are acquired property. If the terms of the insurance policy are such that the moneys are payable to particular nominee, no difficulty arises, since the moneys payable, under it will be regarded as the property of the nominee.¹ But when the policy does not contain the name of the nominee the matter becomes complicated. In *Ponnamah v. Kangasuriyam*² it was conceded in the lower Court that the value of *premia* paid during marriage on the husband's life insurance policy was acquired property. Ennis J. dealing with this item said: "With regard to item 7, the plaintiff claimed Rs. 5,000 as the value of a life insurance policy. Rs. 2,100 the amount of premium paid up to date has been held by the Judge to be acquired property. In as much as the full sum was payable in 1918, and the premiums still to be paid were at the rate of less than Rs. 500 per year, the amount found to be acquired property would seem to be too little in respect of this policy. However, the plaintiff's counsel in the Court below waived the claim to any excess. The policy was taken out after the marriage, and applying the presumption I have already referred to, the *premia* have been paid out of the acquired property".³

In *Poothathamby v. Valupillai*⁴ A effected a policy of insurance on his life in 1910 payable in twenty years or at his death. He married in 1911 and continued to pay the *premia* out of his acquired property until 1917, when B died. From the facts it is not clear whether the parties were governed by the old Thesawalamai or by Ordinance No. 1 of 1911. A died in 1922 and the heirs of B claimed one-half of the premium paid by A during B's lifetime. The only question was whether the claim was prescribed. The District Judge held that as the amount was due in 1917, the claim was prescribed and dismissed the plaintiff's claim. In appeal this order was set aside and it was held that the claim was not prescribed. Ennis J. in the course of his judgement said: "The learned Judge has recorded that it was conceded that the heirs of the wife were

entitled to half the amounts of the *premia* which had been paid at the time the wife died. It would seem, therefore, that the husband had given to the wife a joint interest in this policy to the extent of her contribution. That being so, the only question left to the Court below was one of prescription, which had been raised between the parties. The learned Judge held that the claim was prescribed as the amount became due in 1917 when the testator's wife died. In my opinion the learned Judge was wrong in that finding. On the death of the wife, the share to which her estate would have been entitled would have been a share in the surrender value but in as much as the policy was on the life of her husband the estate could not compel the husband to surrender, neither could it compel him to pay before the policy matured. It was really a claim in expectancy and was not, as the Judge seems to have regarded it, a claim to a definite half in the amount contributed by the wife. That appears to have been taken as a method of calculating the value of the interest to which she would be entitled. As a claim in expectancy it did not become due until the policy in some way matured, either by surrender, or the expiry of 20 years, or by the death of the husband. In the circumstances, it is impossible to say that any question of prescription could arise.

In these cases it was conceded in both Courts that the *premia* paid should only be considered as thediatettam and hence these cases do not decide the question and cannot be cited as authority for the proposition that only the *premia* paid should be regarded as thediatettam. The property acquired on a policy of insurance is the money payable under it and not the *premia* paid. Where a person takes a policy of insurance on life, as observed by Ennis J. his right is only one in expectancy which becomes his property when the policy matures, or for non-payment of premium the policy has acquired a surrender value; further, to regard the *premia* paid as acquired property is not only opposed to principle but is inequitable. For example, if a man insured his life for Rs. 50,000 in 1908 and had paid only four installments when his wife died, and if the *premia* paid in all amounts to Rs. 1,000, according to the view stated in the cases cited, the wife's heirs will be entitled to Rs. 500/- and the husband's heirs to Rs. 49,500. difficulties arise when the insurer has contacted several marriages. If the insured A, married B in 1910 and is the same year took out a life policy for Rs. 5,000 for 20 years and if B died in 1929 and A thereafter married C in 1930, when the policy matures, the question may arise which portion of the Rs. 5,000 is to be re-

1. *Arunasalam v. Ayadurai* 79 N.L.R. 165 & *Subramaniam v. Kadirgamar* 72 N.L.R. 289 at 298.

2. 19 N.L.R. 257

3. 19 N.L.R. at 259.

4. 2 Times 95

garded as the acquired property of the 1st wife and which portion the acquired property of the 2nd wife. A life policy is regarded as a property so as to require *ad valorem* stamp duty when one mortgages one's life policy.¹ Therefore the property acquired is Rs. 5,000. It has been acquired for valuable consideration (by payment of *premia*) during both marriages and therefore is the acquired property of both marriages. The thediatettam of each spouse may be calculated according to the following formula:

$$\frac{\text{premia paid during marriage}}{\text{total premia paid or payable}} \times \text{amount payable under the policy.}$$

This method of computation is not only equitable and just but is also in accordance with the basic principles of Thesawalamai. There is another method of computation, and that is to take the surrender value of the policy at the termination of each marriage. The surrender value never represents the true value of the policy and hence this method is unsatisfactory. Furthermore, when the policy has not been surrendered it will be fictitious to assume, for purposes of valuation, that the policy has acquired a surrender value when in fact it has acquired none. Different considerations would apply if the spouses are governed by Ordinance 1 of 1911 in view of the peculiar wording of section 22 of Ordinance No. 1 of 1911.² But in *Manikkavasagar v. Kandasamy and others*³, a husband had insured his life and paid *premia* during his lifetime. He married twice. The insurance policy matured after his death. His second wife claimed part of the insurance money. The Supreme Court consisting of Sharvananda C.J. and others held that there was no proof that the husband was governed by Thesawalamai or even as a matter of fact the *premia* paid was paid out of his acquired property and therefore that this was not property acquired during coverture since the property accrued to the husband after his death. From the findings of fact it appears that whatever Sharvananda C.J. has said is obiter. He appears to have taken the view that even if a person is governed by Thesawalamai, a husband who pays the *premia* on an insurance policy, such policy is not being drawn up in trust for his wife. In the event of his death, it is

not Thediatettam property and therefore the wife gets no benefit out of it. It is submitted that this view is not tenable since the husband acquired a property in the insurance policy the moment he starts paying the *premia* on each occasion. He could have asked the insurance company to pay whatever that is due at any stage of his life but then he will only receive a reduced amount. Furthermore, if the husband died, even a minute before the policy matured, then it would be Thediatettam. However, if the *premia* was paid out of his acquired property but he died a minute later, according to the view expressed in this case, it is no more to be regarded as Thediatettam. The view of the learned Chief Justice, with whom others agreed, seems to be that when a policy becomes payable it is only then that property in the insurance policy vests. With due respect for what was stated, it vests at every moment. The amount being varying he could, if he so wished, close the transaction and call for whatever money is due from the insurance policy. Vesting must be differentiated from the moment of payment. In this particular case the moment of payment may be after death but the vesting had taken place before his death. No property can accrue to a deceased person if he is no more a legal person. For those reasons, the decisions set out earlier may be followed if the *premia* were paid and the maturity took place before the Amending Ordinance came into force. On the other hand, where the *premia* was paid, after the Amending Ordinance came into force, and after the death of the spouse who is insured or moneys are due on the insurance policy before his or her death, in the absence of a Deed of Trust or any assignment or nomination in the insurance policy the property in the insurance policy vests in the spouse who insured in his name and half of whatever monies that are payable on her death vests in the other spouse as an heir in view of the express provisions of the Amending Ordinance No. 1 of 1911.

1. Porter's Law of Insurance, 5th Edition, p. 383.

2. See *Shanmugalingam v. Amirthalingam* S.C. Inter, 12 D.C. Jaffna 95 and S.C. Minutes of 6 Sept 1948.

3. 1986 2 S. L.R p. 8

CHAPTER XIV

REGISTRATION OF TITLE AND THE LAW OF THESAWALAMAI

A Commission was appointed to inquire into the Law relating to Mortgage Credit facilities and the Protection of Lands of Agriculturists. In their report¹ the Commissioners recommended that a law should be introduced for registration of title and they put forward a tentative draft Ordinance dealing with this matter.²

They said "The essential feature of any system of Registration of Title is that once the State effects registration and issues a certificate of title to an owner, third parties who deal with the owner should be able to rely with complete safety on the title disclosed by the registrar. This being so it is imperative that the register should contain full information as to all possible qualifications affecting the title of the registered owner."

"The principles of Roman-Dutch Law present no great obstacles against securing the objects referred to in paragraph 33 above. Difficulties will, however, arise in the case of persons who are subject to special laws such as the Thesawalamai. A person subject to Thesawalamai, though he may ostensibly be the full owner of the land and deal with it as such, may not in fact be the full owner and it is possible to-day for claims to be made whether on his death or in the event of alienation by him, that special rights in the land exist in favour of other persons. The possibility of such claims being preferred has to be taken into account in a system of registration of title. It is accordingly necessary that any Ordinance providing for the registration of title to land in Ceylon should make special provision to deal with cases where

persons who are subject to the law of Thesawalamai are registered as owners of land. It would be inadvisable and probably improper to declare without qualification that once a particular land is brought upon the Register the title of the registered owner or of his registered successors should be liable to attack on the ground that he was subject to some special law. Such a course would involve serious and undue interference with established law and custom. We, therefore, propose that when a person is registered as owner of the land it should be open to any party wishing to do so to have a caution entered in the Register to the effect that the registered owner is subject to the law of Thesawalamai. If the owner objects to the entry of the caution he can apply for its removal, but the caution would of course not be removed unless the Registrar is satisfied that he is in fact not subject to the law of Thesawalamai. The decision of the Registrar on this point would under the general provisions of the draft Ordinance be subject to appeal to the Courts.

Once such a caution has been entered, it will constitute notice to third parties that claims to the land are liable to be made under the law of Thesawalamai and they will naturally be placed on their guard. While such a caution is on the Register it will be possible for any person to claim either against the party registered or any successor in title that a special interest has accrued by virtue of the law of Thesawalamai. Such a claim will have to be proved and decided upon in the same way as though a similar interest was claimed in land which has not come upon the Register.

It will appear from what we have stated above that the entry of the caution is a necessary condition precedent to the making of a claim against a third party, but we feel that this condition should not be required in cases where a claim is made, not against a person who has derived title for valuable consideration, but only against the owner who is subject to the law of Thesawalamai or anyone else who derives an interest otherwise than for valuable consideration. In the latter cases it will be possible to make the claim even though there is no caution on the Register. Thus, if the registered owner, who is alleged to be subject to the law of Thesawalamai, makes a gift which is liable to attack under that law it would be possible to claim title against the donee even though no caution had been entered before the donee was registered. If however, the donee had subsequently created an encumbrance for valuable consideration, the displacement of the donee by a person claiming under Thesawalamai would not affect the rights of the encumbrancer.

1. *Vide* Sessional Paper, III, 1946 - February, 1946.

2. See Chapter III, Fourth Interim Report of the Mortgage Commission.

The draft Ordinance (in Part VI) provides that upon the death of a registered owner the Registrar must conduct an inquiry for the purpose of deciding who is to be registered in place of the deceased. The decision of the Registrar on such an inquiry will be conclusive subject only to a right of appeal and cannot be disturbed thereafter except on the ground of fraud. It will be seen that if the deceased is a person who is subject to the law of Thesawalamai, the decision of the Registrar as to who should be registered after his death will be quite different to the decision he would make if the deceased were subject to the Roman-Dutch Law. The work of the Registrar would be brought to a stand still if he has, upon the death of every registered owner, to inquire and decide whether or not the deceased was subject to the law of Thesawalamai. We think it sufficient that he should be bound to conduct an inquiry into this question only when a caution is in force at the time of the death or when the question is raised at the time of inquiry. In other cases the Registrar will be entitled to presume that the deceased was not subject to the law of Thesawalamai and will proceed to registration accordingly.¹

In order to give effect to their recommendation, they appended a draft Ordinance. The relevant sections of the draft Ordinance are sections 138 and 142, which run as follows:-

- 138 (1) The Registrar shall, on application made to him on that behalf in the prescribed form, enter a caution in the Register to the effect that the person for the time being registered as the owner of any land is alleged to be subject to the law of Thesawalamai.

A caution under this sub-section may be entered at the time of the Registration as owner of the person alleged to be so subject or at any time while such person is so registered or at any time after the death of such person.

Provided, however, that no caution to the effect that the deceased registered owner is alleged to be so subject shall be entered in the Register if any other person has already been registered after inquiry held under Part VI upon the death of the person alleged to be so subject, as owner of the land or the

1. Chapter I, paragraphs 33-36 of the Fourth Interim Report of the Mortgage Commission - Sessional Paper III, 1945.

holder of the limited interest therein or has been registered as owner under section 99.

- 138 (2) A caution entered under sub-section (1) shall, unless removed in accordance with the provisions of this Ordinance relating to the removal of cautions, continue in force notwithstanding the registration of any person as new owner of the land or of any part or share thereof by virtue of any disposition by or against the person alleged to be subject to the law of Thesawalamai: Provided, however, that in the event of any such registration, the caution shall be cancelled by the Registrar if he is satisfied that the person alleged in the caution to be subject to the law of Thesawalamai is dead and that a period of two years has elapsed after his death.

1. Where a caution has been entered in the Register under section 138 and is for the time being in force, then any person who (whether on the death of the person alleged to be subject to the Thesawalamai or any other time) proves that if the land were not registered land, he would be entitled, as owner to the land or any part or undivided share thereof by reason that the person alleged to be subject to the law of Thesawalamai is or was so subject, shall be entitled to be registered as owner of the land or such part or share thereof, and upon his being so registered his title thereto shall not be subject to the rights or interests of any other person who has, while the caution remains in force, been registered by virtue of any disposition as the owner of the land or of any part or share thereof or the holder of limited interest therein or as encumbrancer except to such extent if any as his title would have been subject to any such rights or interest if the land were not registered land.

In this sub-section disposition includes any disposition against the executor or administrator of the deceased registered owner in his capacity as such, whether effected under sections 96 or 99 or otherwise.

2. In any case referred to in sub-section (1) the Registrar may make an entry in the Register or cancel or alter any entry made therein, for the purpose of securing that the Register contains accurate information as to the rights and interests in the land, and the Registrar shall in so doing have regard to the provisions of that sub-section.

- 139 (1) Notwithstanding that no caution has been entered in the Register under section 138 to the effect that a person registered as the owner of any land is alleged to be subject to the law of Thesawalamai, any person who while such registration continues in force or at any time thereafter proves that if the land were not registered land, he would have been entitled, as owner, to the land or to any part or undivided share thereof by reason that the person so registered is or was subject to such law, shall be entitled to be registered as such, if but only-
- (a) the person so proved to be subject to the law of Thesawalamai is for the time being registered as owner of the land or part or share thereof; or
 - (b) some other person is for the time being registered as owner, and it is proved that neither he nor any predecessor-in-title derived title for valuable consideration.

Provided, however, that no registration shall be effected under this sub-section in respect of any land or part or share thereof at any time after the death of the person alleged to have been subject to the Thesawalamai, if any other person has upon such death already been registered as owner thereof after inquiry held under Part VI.

(2) Where any person is registered under sub-section (1) as owner of any land or part or share thereof, the title of such person shall be subject to the rights or interests of every person who at the time of such registration was, by virtue of any disposition for valuable consideration, for the time being registered as an encumbrancer or the holder of a limited interest in the land or part or share thereof in respect of which registration is effected under sub-section.

(3) Where registration is effected under sub-section (1) the Registrar may make any entry in the Register or cancel or alter any entry made therein, for the purpose of securing that the Register contains accurate information as to the rights and interests in the land, and the Registrar shall in so doing have regard to the provisions of sub-section (2).

(1) Every application for the registration of any person as owner of any land or part or share thereof under section 139 or section 140 shall be made to

the Registrar, and upon such application being made the Registrar shall give notice thereof to every person appearing on the Register to be a person whose interest is likely to be affected if the applicant is so registered:

Provided that any such application made upon the death of the person alleged to be subject to the Thesawalamai shall be made under section 87 and determined or disposed of in accordance with the provisions of Part VI and nothing in this section shall apply in any such case.

(2) The Registrar shall hold an inquiry at which the applicant and every person to whom notice is required by sub-section (1) so be given shall be entitled to be represented.

(3) The decision of the Registrar on any such application shall be subject to an appeal to the District Court-

- (a) Where, at the time of the death of a person registered as the owner of any land, a caution entered under section 138 to the effect that such person is alleged to be subject to the law of Thesawalamai is in force, then for the purpose of any inquiry or reference under Part VI of this Ordinance, it shall be presumed that such person was subject to the law of Thesawalamai, unless any person claiming to be the owner of the land or any part or share thereof under the will or upon the intestacy of the deceased person alleges that such person was not subject to such law.
- (b) Where, at the time of the death of the person registered as owner of any land, no caution entered under section 138 to the effect that such person is alleged to be subject to the law of Thesawalamai is in force, then for the purpose of any inquiry or reference under Part VI, it shall be presumed that such person was not subject to the law of Thesawalamai, unless some person for the purpose of claiming to be owner of the land or any part thereof alleges that he was so subject.

This draft Ordinance has not yet been adopted by the Legislation.

CHAPTER XV

THE LAW OF INHERITANCE

In dealing with the law of Inheritance under the Thesawalamai, three periods must be distinguished. The law of succession varies, therefore, according to whether the death of a person occurred:

- (i) before Ordinance No. 1 of 1911 came into operation;
- (ii) after it came into operation until Ordinance No. 58 of 1947 came into force; or
- (iii) whether it occurred thereafter.

The law before Ordinance No. 1 of 1911

To understand the law of succession before Ordinance No. 1 of 1911 came into operation, one should appreciate the pattern of the joint family system known to the Tamils. It is not identical with the joint family system as developed by the Hindu Law. The primitive joint family system, which existed in Thesawalamai, is common to many systems of customary law of the Indians and the Sinhalese. Judges who have not understood these principles, in their correct perspective, have often referred to the rules of Thesawalamai as 'the wilderness of single instances'.¹ The old law only applies to the estate of a spouse before dying and after 17 July 1961.²

The old Thesawalamai recognised the joint family system where the father, the mother and the children were the members. On the death of one spouse, the other spouse became the manager or manageress and as such,

1. Tennyson cited by Pereira J., in *Chellappa v. Kanapathi* 17 N.L.R. 295.

2. *Soosapillai v. Soosapillai* (1956) 57 N.L.R. 529

was given the right to give dowry to their daughters. The living spouse was also given a life-interest over the property of the deceased spouse, but this interest ceased when the sons attained majority. Another rule, common to both Indian and Ceylon customary law, is that property reverts back to the source from which it came. The rule that property devolved on descendant, failing whom ascendants, and then to collaterals was also observed. With these preliminary observations, we now proceed to deal with the rules of succession in detail.

Descendants

It is a cardinal rule of Thesawalamai that a dowried daughter is not entitled to any inheritance from her parents if there are sons or unmarried daughters. The dowry can be given even before marriage provided it is intended as a marriage settlement.¹ But if she brings into hotch-potch her dowry property she could share her parent's estate with her brothers and unmarried daughters as intestate heirs.²

When the father dies first, leaving a widow and his children, so long as the parents lived the sons could not claim anything but, on the other hand, they were bound to bring into the common estate all that they had gained or earned during the whole time of their bachelor hood excepting gold, or silver ornaments which have been worn by them and which have been acquired by themselves or given to them by their parents.

This rule applies even if the sons were later married and had quit-
ted the parental roof.³ When the father died leaving one or more children, the whole of the property remained with the mother provided she took charge of the children. If the child happened to be a daughter, then she was entitled to a dowry given by the mother, and the mother, therefore, had the power to grant dowry to her daughter even from the husband's property.

The son or sons could not demand the property of their father so long as the mother lived.⁴ But property acquired by a son, unmarried, but not under the parental roof or control, did not become part of the common

1. See rule and *Kandappa v. Weeragatty*. (1951) 53 N.L.R. 119; *The v. Ganeshalingam* (1952) 55 N.L.R. 76.

2. *Murugesu v. Subramaniam* (1967) 69 N.L.R. 532.

3. *Thes. Code* 1.7

4. *Thes. Code* 1.9

property.¹ Hence, when the father died, the mother managed the property and was under an obligation to give a dowry to her daughters, although in ancient times she should only do so out of her own dowry property. It is said that due to the Portuguese government, she was given the right to give the dowry out of the common estate or out of the Mudusam of her husband. She was given this power even after the death of her husband.²

The mother dying first

If the mother dies first, leaving children, the father remained in full possession of the estate, so long as he did not marry again and looked after his children. The father had the power to dowry his daughter out of the mother's property, his property or the Thediatettam.³

If the mother marries a second time leaving sons by the first marriage and a daughter by the second marriage, it was held that the dowry she received on the occasion of her first marriage devolves exclusively to the sons of the first marriage.⁴ It is submitted that this view is against the spirit of Thesawalamai which allowed the daughter to own dowry property. The rule that property originates during the first marriage goes exclusively to the children of the first marriage is a settled one.⁵

The Jaffna Matrimonial Rights and Inheritance Ordinance brought about a change in the law in relation to this aspect. It is stated that the father only had a life-interest until the children got married or attained majority. On the strength of this provision, it was contended that the provisions of the old Thesawalamai were impliedly repealed by this enactment. However, this contention was rejected and it was held that the husband had a life-interest over the property of the deceased wife during his existence under the old Thesawalamai.

After dowrying the daughters, if anything is left over, the remaining children, i.e. the sons and the unmarried daughters would divide the inheritance equally after the Husband's death.

1. vide Kander v. Sinnachipillai (1934) 36 N.L.R. 363.
2. vide Sinnathangachy v. Poopathy (1934) 36 N.L.R. 103
3. Nagaratnam v. Alagaratnam 14 N.L.R. p. 60.
4. Followed in Chellappa v. Kanapathy (1914) 17 N.L.R. 295 distinguished in Murugapillai v. Poothathamby (1917) 20 N.L.R. 200.
5. Ayadurai v. Kathirevi Pillai (1956) 60 N.L.R. 483

In Chellapah v. Kanapathipillai¹ it was urged, on the authority of Navaratnam v. Alagaratnam,² that in view of the rule of Thesawalamai that female succeed female, the unmarried daughters would succeed to the dowry of their mother to the exclusion of the sons. But this contention was rejected and it was held that the sons and unmarried daughters divided the inheritance as they were all heirs of the mother. Once the father re-married, he was not regarded as a suitable guardian of the children by the first marriage. Such children were usually given to the custody of the maternal grandmother of the children or other nearer relations. The Thesawalamai Code provides that in such a case the father must hand over the whole of the property brought over in marriage by the deceased wife and half of the property, acquired during his first marriage. The surviving spouse, may continue to possess the property which has devolved on the minor child during the continuance of the minority.³

If both Parents died leaving children,

If the father and the mother were married only once and both died, leaving only minor children, the Thesawalamai Code states that the relations of both sides would assemble and, after consultation, decide as to whom the children should be entrusted. The persons to whom the children were entrusted, were given the whole of the property left by the parents. Such property remains with such persons, until the children attain the competent age to marry. The Code further provides that, on the occasion of marriage, friends and relations must assemble and decide as to what property should be given to the girls as dowries. This section is again a relic of the joint family system which must have prevailed at some time. Construing this provision, which was obsolete long ago, Moncrief J. in Valliamma v. Ponnambalam,⁴ without expressing any positive view, observed "but it appears to me that those friends who assembled, although they are given the power to apportion part of the parent's property and to give, for example, to a daughter her dowry, had no right or power to pass title in property in which they have no interest".

It would appear that the dictum of Moncrief J., is correct in principle since on the death of a parent his or her property vests in the heirs.⁵ There-

1. (1914) 17 N.L.R. 294,
2. 14 N.L.R. 60
3. Section 37 of the Jaffna Matrimonial Rights of the Inheritance Ordinance.
4. 2 Brown Cases 234 at 235 and Silva v. Silva 10 N.L.R.234
5. vide Silva v. Silva (supra.)

fore, the relatives who are assembled have no title nor interest to convey to the person to whom the dowry is granted.

Succession when both parents contract a number of marriages

When a parent contracts more than one marriage and has children by such unions, he or she has the right to convey to any child, either by way of dowry or otherwise, his or her separate Property a daughter by a particular union out of separate properties belonging to the parent of that particular daughter and also out of the Thediatettam property of that particular union. If, after dowsing such daughters, anything is left over then the separate property who has contracted several union will be divided per stripes and inherited by the children of each union. Thus, on the death of a father who has married a second time, one half ancestral property will devolve on the issue of the first marriage, the other half on the issue of the second marriage, whatsoever the numbers of the different unions may be.¹

The Thesawalamai property acquired during each union will only go to the children of that particular union, excluding dowried daughters.²

The general rule is that a dowried daughter is excluded from the inheritance of the parents. The principle that a dowried daughter forfeits her right to the inheritance of the parents does not apply where a property has already vested in the daughter before marriage.³ But there is an exception to this general rule. If the husband has been married twice and has a son and a daughter by the first wife, and only a daughter by the second wife, and if all the daughter have received dowry, and the father died, the son alone did not succeed to the estate of the deceased, but the daughter of the second marriage inherited equally with her brothers, there being no full brother to exclude her.⁴

Succession to Collaterals, Brothers and Sisters

Under the old Thesawalamai, the general rule is that females succeed to a married sister and a brother, it is the married sister, her daughters

1. Murugupillai v. Poothathamby (1917) 20 N.L.R. 204; Thes. Cod. 1.2

2. Full discussion in Tambiah (Jaffna) 227-231.

3. Murugesu v. Muthiah (1963) 65 NLR 57

4. Thes Cod. 14.

and grand daughters who succeeded to the exclusion of the brother.¹ But if there were no sisters, daughters or grand-daughters to inherit such property, then it devolved on the brothers, their sons and grand-sons.

The rule that a female succeeds to a female is carried to such an extent that even a dowried sister succeeds to the property of an unmarried sister to the exclusion of the brother.² But among sisters, not only the dowried sister but even the unmarried sisters succeeded equally to the property of a deceased sister who died without children.³ Similarly, brothers succeed brothers on the principle that males succeed males, hence if a brother dies leaving Mudusam property, then such property devolved on his brothers, their male children and descendants to the exclusion of his sisters and their descendants. The same rule applies to Thediatettam of a brother.⁴

Succession by Nephews and Nieces

If there are no brothers and sisters surviving, then the children of the brothers and sisters of the deceased succeed to his property. If a man has a child or children and his brother and sister died before or after him without children, then the man's son succeeds to his brother's and sister's property as well as to that of his deceased father.⁵ The Thesawalamai Code proceeds to state that it is the same with a woman who has a child or children where a brother or sister dies without leaving children, this woman's daughter of daughters inherit both from the brothers and sisters of her or their deceased mother. But if the said brother and sister die first, and if the mother of the aforementioned daughter is still alive, then the mother inherits from the mother and sister; whereby the daughters remain deprived of that inheritance, for when the mother afterwards dies, her son or sons are justly entitled to all what their mother leaves at her death. In Valipillay v. Saranamuttu.⁶ it was held that where a man died intestate and issueless, leaving sons and daughters of a deceased sister, both the sons and daughters of the deceased sister succeeded to his estate and the daughters did not exclude the sons of the deceased sister, the reason being that section 1 clause 14 of the Thes. Cod. did not expressly exclude the same.

1. Thes. Cod. 1.5

2. vide Thamber v. Sinnetamby (1903) 4 Tamb.60

3. vide Kuttar v. Sinnar (1914) 17 N.L.R.. P. 243)

4. vide Vythilingam v. Sabapathipillai (1903) 3 Tamb. 120)

5 Thes. Cod. 1.14.

Half-Brothers and Sisters

If a person dies leaving full brothers and sisters and half-brothers and sisters, then the half-brothers by the father-side and the full brothers inherit equally the property that came from the father-side; the half brothers and full brothers inherit equally the property that came from the mother-side. In such a case, the acquired property is divided equally between the full brothers and the half-brothers.¹ If there are no full brothers and sisters and a person dies intestate and without issue, his mudusam devolves upon the children of the father's other marriage, equally, whether they are males or females, the dowried daughters being excluded.²

Illegitimate Brothers and Sisters

Illegitimate brothers and sisters succeed one another to the exclusion of their mother.³ In this case, Schneider A.J. said "The contest in this case comprises of two distinct questions,

- (1) In the law, what relationship, if any, exists between the deceased and her mother and her half sister,
- (2) when that is ascertained, what law of intestate succession applies –

the Thesawalamai or the Roman-Dutch law? As regards the first question, the Thesawalamai is altogether silent, It is therefore beyond doubt that for its decision we must resort to the Roman - Dutch law. The principle that a mother makes no bastards is recognised by that systems of law. The principle operates to make the second respondent the lawful mother and the second appellant the lawful half-sister of the deceased. The remainder of the contest then resolves itself into one question, given that the deceased left her surviving her mother and her half-sister, who is her heir? According to the cases of the Thesawalamai, as expressly provided for in this case or if the principle for its decision can be drawn from the general principles of Thesawalamai, the Roman Dutch law has no application.

The Thesawalamai does not contain any express provision. It declares that the half sister as the sole heir upon the principle that collaterals exclude ascendants - a principle which is the very antithesis of the Roman

1. Thes. Cod. - 1-13

2. Vide D.C. Jaffna 1046 2 Grenier (1873) 140.

3. vide Channugam v. Kandiah (1921) 23 N.L.R. 221

Dutch principle which prefers ascendants to collaterals. It seems to me, therefore, that the second appellant and the half sister must be declared the sole heir. Here we find principles of Roman Dutch law being applied for certain purposes and principles deducible from the general principal of Thesawalamai being applied for other purposes.

Parents

If a person dies without issues and brothers and sisters to succeed, then his property reverts to the parents, if alive, If the father is not alive, the fathers mudusam or hereditary property and one half of the Thediatettam (after deducting half the debts) devolves first to the father's brothers and their descendants, and the mother's chedanam or dowry with the other half of the acquired property, after deducting half the debts, devolves to the mother's sister or sisters, their daughters or grand — daughters ad in-finitum, But where a man dies leaving property which he has acquired after leaving the parental home, his brothers succeeded to such property, they being his agnates. The father had no claim to such property.¹

The parents only succeed if the brothers and sisters and their children fail. (Thes. Cod. 1.5) If both parents are alive, then the property which the child derives from the father-side goes to the father, and the property derived from the mother-side goes to the mother. The Thediatettam is divided into two after payment of debts - one half goes to the father and the other half to the mother. If only the father survived the property inherited by the child from the mother-side did not go to him but devolved on the mother's next-of-kin.²

Succession of Uncles and Aunts

If a person dies without children, brother and sisters, and his father then the property which he derived from his fathers side, went to the next-of-kin of is father to the exclusion of the mother, if the mother was surviving only the father, then the property derived from the mother-side would go to her next-of-kin to the exclusion of the father. Here, the rule that property reverts to the side from which it came is strictly observed. But, in dealing with the devolution of property between uncles and aunts, the rule that a

1 Thes. Cod, 1.7

2 Thangarajah v. Paramehotipillai (1907) 11 N.L.R. p. 46.

female succeeds female and male succeeds male is not observed. All the uncles and aunts divide the property equally.¹

Casus Omissis

The Courts, if they could not deduce any principle from the law of Thesawalamai, often respected to the Roman-Dutch Law. Thus in Pooththamby v. Mylvaganam² where a person died intestate and without heirs in the descending or ascending line, and where there were children of the uncles and aunts, it was held that the succession should be governed, in the absence of any rule of Thesawalamai, by the Roman-Dutch Law which admits such children to the inheritance per stripes. Similarly, Teypar v. Sivahamipillai one Teypar married twice, a great-grand son of Teypar by the second marriage, dies intestate. The descendants of Teypar by the second marriage had claimed the right to inherit the intestate property to the exclusion of the plaintiff, who were descendants of Teypar by his first wife. It was held that, in the absence of any express provision in the Thesawalamai to settle this question, the Roman-Dutch law applied, according to which the heirs of the half-blood were entitled to share the land with those of the full-blood.

1. Nagaratnam v. Mootothamby (1915) 18 N.L.R. p. 257

2. (1897) 3 N.L.R. p. 42

CHAPTER XVI

INHERITANCE UNDER THE JAFFNA MATRIMONIAL RIGHTS AND INHERITANCE ORDINANCE OF 1947

The rules regarding inheritance under the Thesawalamai, were found to be harsh and defective and not expressed with sufficient precision in certain matters. Therefore, as far back as 1892, a meeting of the residence of Jaffna Peninsula, representing its intelligence and respectability was convened by P.W. Connolly, the district Judge of Jaffna at that time, to consider law reform. The Committee, which consisted of members of the Legislative council, Chief Headman, District Judge and the Police magistrate of Jaffna and many other leading members of the Tamil Community, at that time, adopted as the basis of their deliberation a memorandum of inheritance prepared by one Mr. Kathiravelupillai, who was then the Police Magistrate of Kayts. On the suggestion of the Tamil Member of the Legislative Council, this matter was taken up again in the Legislative Council and the Jaffna Matrimonial Rights and Inheritance Ordinance was drafted and enacted as law. Its main object is to simply the law relating to inheritance and matrimonial rights and to free "such provisions of the law as have been preserved from the quaint language of the translation, now is use of the Dutch version of the Thesawalamai¹).

This Ordinance is applicable to Tamils to whom the Thesawalamai applies² It is also made applicable to a woman, who originally was not governed by the Thesawalamai, but who is married to a Thesawalamai subject, during her coverture.³ But it does not apply to a woman governed by

1. vide draft Ordinance-Objects and reasons-Govt. Gazette 30.11.1910

2. vide section 2 of Cap. 48).

Thesawalamai, but who is married to a man not governed by this system of law during coveture.¹ It was a matter of controversy whether this Ordinance applied to property outside Jaffna but all controversy on this matter has now been settled by the Amendment No. 58 of 1947, which specifically states that it applies to all property situated in any part of Ceylon owned by persons governed by thesawalamai.²

The ordinance is divided into three main parts. Part 1 deals with applicability of Thesawalamai to married women. Part 11 deals with the respective matrimonial rights of both husband and wife, with reference to their properties. It enacts that the property of a wife acquired during or before marriage, except thediatettam, will remain her separate property and property of the husband acquired before or after marriage, except thediatettam, is his separate property. The wife is given the power to alienate her immovable property by an act inter vivos with the written consent of the husband, and in the case of movables, without his consent. But she could bequeath her property, movable or immovable, without her husband's consent, as if she was unmarried. Where the consent is unreasonably withheld, power is given to the District Court to grant the consent for alienating her property. It was also provided that here there is a separation *a mensa et thoro*, decreed by a competent court, the consent of the husband is not necessary to enable the wife to deal or dispose of her property as if she was a femme sole. For the purpose of considering whether consent should be given, the District judge was given the power to hear the case summarily, and decide the matter. It also made gifts from wives to husbands and vice versa valid, whether the gifts were movables or immovables, except jewels and personal ornaments, wearing apparel suitable in respect of the wife's rank and status, given to her by her husband, all properties which were granted, gifted or settled and all acquisitions made by husband, all properties which were granted, gifted or settled and all acquisitions made by husband or wife, out of, by means of monies or properties of the other are made subject to the debts and engagements of each spouse to the same extent as if the gift or settlement has not been made.

The Ordinance also contains provisions for the District Judge to settle disputes arising out of property between husband and wife (section 10). Power is also given to husband or wife to affect a policy of insurance upon his or her lifetime (Section 11). Such policies of insurance which have

1. *ibid*

2. for the doubts expressed earlier, see dictum of Bertram C.J. in Seelachy's case 23/97

been assigned to the separate use of the other spouse and all benefits arising thereon will be regarded as the separate property of that spouse. If the husband has taken the policy of insurance in his name and expressed upon the faith of the said policy, that it is for the benefit of his wife and children, then the insurance monies will be deemed as a trust for the benefit of his wife for her separate use, and of the children of any of them, according to the interest so expressed, and shall not, so long as the object of that trust remains, be subject to the control of the husband or creditors or form part of his estate. But if the said policy was affected in order to defraud one's creditors, then they were entitled to receive, out of the sum payable on the policy, a sum of equal to the premium so paid (section 12). It also imposed on a married woman, who had separate property adequate for the purpose, to maintain her children whether she remained married or became a widow. It also specifically states that this provision shall not in any way relieve her husband from any liability imposed on him by law to maintain his children.

Part 11 deals with inheritance.

Different kinds of Property under the Ordinance

The following kinds of property are mentioned in the ordinance: Mudusam, Urumai, and thediatettam. Property descending on a person on the death of one's parents or any other ancestor in the ascending line is called Mudusam of matrimonial inheritance (section 15); property derived by one by descent at the death of a relation, other than a parent or an ancestor in the ascending line, is called Urumai or non-patrimonial inheritance. Property given as dowry comes under a different category as dowry property and is clear enough, thus it is not defined.

Thediatettam is defined as:

- a) Property acquired for valuable consideration by either husband or wife during the subsistence of marriage,
- b) Profits arising during the subsistence of the marriage from the property of any husband or wife.

It has already been stated how this definition has received subsequent modification.

The Ordinance also divides property into three grand divisions, namely property acquired from the father-side, property acquired from the mother-side and Thediatettam or acquired property.

Property received by any person in mudusam, or in urumai or dowry, on the will, legatee of in donation, or in an manner other than for pecuniary consideration from his father or any of his ascendance or any of his collateral relations is defined as property derived from the father-side. (section 17) Similarly, property received in Mudusam or in Urumai or in Dowry or under a will as heir, or legatee or in donation or in a manner other than for pecuniary consideration from the mother or any of her ascendants or any of her collateral relations is said to be property derived from the mother-side. It is clear, therefore, that under this Ordinance too residuary property, which does not come within the description of property derived from the father-side or mother-side or thediatettam could be acquired by either spouse. Thus, for example, property gifted by a strange to the husband or wife does not come within the description of those classes of properties.

The general order of succession is descendants and collaterals.

Descendants

Children, grandchildren and remoter descendants are preferred to all others in the matter of succession. All children take the estate equally per capita but children of remoter issues of the deceased child take it per stripes. (section 22) The word 'children' also include legitimate children; it also applies to children in the womb at the time in question, who are afterwards born alive. (section 33)

These rules of succession are, however, subject to the right of the surviving spouse, who is given the right to pay of debts, out of the whole of the property of the deceased spouse and half of the Thediatettam. When the estate of a deceased parent devolves on a minor child, the surviving parent may continue to possess the same and enjoy the income of such properties till such child is married or has attained majority. (Section 37) But the surviving spouse who continues in possession of the estate of the deceased spouse, he is bound to maintain the children till they attain majority either by effluence of time or by marriage. (Section 38)

Parents

The children or remoter descendants failing, the property is divided into property-derived from the father-side and property derived from the mother-side. The whole of the property derived from the father-side and one-

half of the remainder of the deceased. Exclusive of the property derived from the mother-side, is inherited by the father if he is surviving. Similarly, the whole of the property the deceased derives from the mother-side and one-half the remainder of the estate of the deceased. Exclusive of the property derived from the father-side devolves on the mother, if she survives. (section 24)

It must be noted that the remainder of the estate referred to in these sections, will include Thediatettam property and also property other than those received from the father-side and the mother-side.

Brothers and Sisters

The father failing, the property of the intestate derived from the father-side and one-half of the remainder of the estate (exclusive of that derived from the mother-side) devolves upon the intestate full brothers and sisters as well upon the half brothers and half sisters related to the intestate by the father-side, in equal shares, and their children and other issue by representations. If only half brothers and half sisters survive, then such property is divided by the half sisters and half brothers on the father-side and their issue by representation. (Section 24) If the major predeceases then the property of the estate of the intestate, derived from the mother-side, and one half of the remainder of the intestate's estate exclusive of that derived from the father-side) devolves upon the intestate's full brothers and sisters as well as on half-brothers and half sisters related to the intestate by the mother-side, in equal shares, their children and their issue by representation or only on half brothers and half sisters related to the intestate by the mother's side and their issue by representation if there are no full brothers and sisters or their issue. (section 26)

Grandparents

All persons enumerated above failing, the property derived from the father-side and one half the remainder of the estate (excluding the property derived from the mother-side) devolves on the paternal grandparents or grandparents, if alive. similarly, if the property derived from the mother-side and one half the remainder of the estate (excluding the property derived from the father-side) devolves on the maternal grandparent or grandparents, if a

In the case of Markhand v. Vytilingam,¹ an interesting question arises, a person subject to Thesawalamai died intestate and issueless leaving her surviving grandfather (i.e. father's father) and brothers and sisters of a grandmother (father's mother). The property in question was inherited by a from her father who, in turn, inherited the same from his own mother. It was contended on the principle that property must revert to the source from which it came that this property should go back to A's grandmother. This contention, however, was rejected since the MAR. Ordinance has made specific provisions making B, the surviving grandfather, the sole heir to such property.

Uncles and Aunts

If no grandparents are alive and failing the other persons enumerated, property derived from the father's side and one-half of the remainder of the estate (exclusive of the property derived from the mother's side) devolves on the paternal uncles and aunts issues, the issues taking *per stirps*. Similarly, property derived from the mother-side and half the remainder of the (exclusive of the property derived from the father's side) devolves on the maternal uncles, aunts and their issues, by representation (section 28) property derived from the mother's side and half of the remainder of the estate (exclusive of the property derived from the father's side) devolves on the maternal uncles and aunts their issues by representation.

Great Grandparents

Failing all above mentioned, the property derived from the father-side and one-half of the remainder of the estate exclusive of the property derived from the mother's side devolves on the great grandparents *per capita*. (Section 27) similarly, property derived from the mother-side and one-half of the remainder of the estate devolves on the maternal great grandparents *per capita*.

Brothers and Sisters of the Grandparents

Great grandparents failing, property derived from the father's side and one-half of the remainder (exclusive of the property derived from the mother's side) devolves on the brothers and sisters of the paternal grandparents and their descendants if surviving.

1. (1917) 20 N.L.R. 216

Similarly, the property defied from the mother's side and one half of the remainder of the estate (exclusive of the property derived from the father's side), devolves on the brothers and sisters of maternal grandparents and their descendants if surviving. (section 28)

Failing the persons above enumerated, the property derived from the father's side and one half of the remainder of the estate devolves on the brothers and sisters of the next nearest in the ascending line of the father and their descendants (section 27). Similarly property derived from the mother-side devolves exclusively on the brothers and sisters of the next nearest in the ascending line on the mother side and their children. (section 28)

Except when otherwise expressly provided, if all those who succeeded to the inheritance are equally near in degree to the intestate, they take *per capita* and not *per stirps*. (section 29) It is only if the heirs mentioned above fail that the property of the father-side will go to the kindred of the mother-side and *vice versa*. (section 30)

When all the relatives set out above, fail, the surviving spouse become the heir of the deceased spouse. (section 31) But it must be noted that the amending Ordinance has made the surviving spouse heir to half of the Thediatettam.

If all the relations mentioned above fail, property escheats to the Crown. But, If, however, any heir can be found, even, beyond the tenth degree, they take the inheritance. (section 32)

Provision is made for children or grandchildren, for the children to bring into hotchpotch dowries given or properties derived otherwise than on the occasion of the marriage or to advance them in life, if they wished to claim inheritance along with their surviving brothers and sisters. This provision is taken verbatim from section 35 of the Matrimonial Rights and Inheritance Ordinance (Re his particular provision see section 33 of Cap. 48.)

The Roman-Dutch Law as to collation was superseded by the provisions of section 39 of Ordinance No.15 of 1876.¹ The law of collations,

1 vide Vaithianathan v. Mennatchi (1913) 17 N.L.R. p. 26

therefore, whether among persons governed by the Roman Dutch Law, or the Thesawalamai, is now contained in these provisions.

The phrase "Advance or Establish in life", must be given a special meaning or the result would be that every gift from parent or child would be liable to collation. For a gift to fall into the class of gifts intended to advance a child in life, (Sec.... It must be reasonably clear from all the circumstances that when the parent made the gift he had in contemplation the fact that the child would inherit a certain share of the inheritance on his death, and that in anticipation of that event, decided to draw on the ultimate share in order, presently, to advance or establish the child in life.

The question whether there was a gift on the occasion of marriage has to be answered, by giving the true meaning of the phrase 'on the occasion of the marriage'. It does not mean that the gift should be on the occasion on which the marriage takes place. It must, be given a wider meaning and must be made co-extensive with the Latin phrase employed by the Roman-Dutch Text writers *propter nuptias* - and therefore would include a gift in contemplation in marriage.¹ The judgement of the Supreme Court was affirmed by the Privy Council)

It is not necessary that children should bring into hotchpotch or collation property which they have received to advance them in life or by way of dowry. If they do not wish to claim the property of their parents by way of intestate succession they could abandon their rights to such succession without bringing into hotchpotch whatever that was given to them to advance them in life or by way of dowry. It is only when they wished to claim in the inheritance, they have to bring into hotchpotch such property.

Illegitimate Children

Illegitimate children can inherit the property of the intestate mother, but not that of their father. (Section 34) The question whether such child can inherit the property of the mother's relatives cannot be solved by resorting to the provisions of the Matrimonial Rights and Inheritance Ordinance (Jaffna). being a *casus omissus*, one had to look into the provisions of the Matrimonial Rights and Inheritance Ordinance for guidance made specially applicable.

The latter Ordinance specially provides that the illegitimate child cannot inherit the property of the relatives of the mother. (Section 33 of Cap. 47) Illegitimate children cannot succeed to the property of the fathers's relatives under the Roman-Dutch Law and this principle would apply to persons governed by the Thesawalamai as well, in view of the fact that being a *casus omissus*, both in the Jaffna Matrimonial Rights and Inheritance Ordinance (Jaffna), governing inheritance, the provision of the general Roman-Dutch Law and such laws as applicable to the Tamil inhabitants of the Western Province are made specially applicable (section 36). If the General Matrimonial Rights and Inheritance makes no provisions, then one has to resort to the New Aasdoms law. The Aasdom Law is based on the Placast of 8.12.1599. It sets that all succession not provided for therein are to be governed by the Roman Law as stated by Justinian. (Article XIV).

Where, for instance, the Roman Dutch Law is resorted to in a matter of succession among persons governed by Thesawalamai, is found in the case of Chellaiah v. Kathiravelu.¹ In this case, the question at issue was whether a woman of illegitimate birth subject to thesawalamai died intestate leaving her husband and no issue; the question was whether the legitimate issue of her mother succeeded to her dowry property in preference to the husband. This question was answered in the affirmative. It was contended that the effect of section 37 of Ordinance No. 1 of 1911 was to make the husband of heir. This section enacts as follows: "when an illegitimate person leaves no surviving spouse or descendants, her or his property will go to the mother and then to the heirs of the mother, so as to exclude the Crown". In view of the wording of the section, it was contended that the husband had a preference claim. But this contention was rejected. Applying to the Roman Dutch Law, the judges found that there was no difficulty in deciding that the mother's children were preferred to the husband.

1. (1931) 33 N.L.R. p. 172

1 vide *Kaliamma v. Sellasamy* 21 C.L.W. p. 6.

CHAPTER XVII

LIMITED INTERESTS IN PROPERTY

In dealing with interests in property, peculiar to the law of Thesawalamai, one need only consider the law of otti mortgages, servitudes peculiar to Thesawalamai, and pre-emption.

OTTI MORTGAGES

Otti mortgage is a form of usufructuary mortgage peculiar to the law of Thesawalamai by which the mortgagee enjoyed the produce in lieu of the interest. The property was only redeemable at certain periods to ensure that the mortgagee who has sown the seed or cultivated crops, would get the benefit of such produce. In the case of permanent plantations like palmyrah etc., the lease could only be redeemed after the seasons of produce was over. This was the old law and specific provisions are found in the Thesawalamai Code. But, in modern law, these provisions are obsolete and the terms on which a usufructuary mortgage is enjoyed are contained in the deed notarially creating the mortgage.¹

Leases peculiar to the Thesawalamai are set out in section 7 of part 9 of the old Thesawalamai Regulation. These provisions are obsolete today. Again, the leasee's rights are determined by the contents of the deed of lease. The Thesawalamai Code also provides for a planter's interest in the terms of the agreement and the general law of the land.²

1. For further details see Tambiah cap. 20).

2. for a fuller discussion - Tambiah cap. 19.)

SERVITUDES

The law of servitude is generally the law of the land but there are certain peculiar servitudes found only in the northern province. These servitudes apply to persons who own lands in that locality whether they were governed by Thesawalamai, personally or not.

Under the Roman-Dutch law, new kinds of servitude were recognized by custom but it must be proved that such a custom was certain and invariable. In *Vallipuram v. Sandanam* 1 C.W.R.96, it was contended that according to the long established custom of the country, adjoining landowners in the northern province, should not plant coconut trees and other fruit trees beyond the boundary of certain fields excepting to a distance of four yards (a measure equal to four yards from that boundary). But since the existence of this form of restraint was uncertain, the Court refused to recognize such a servitude. But it must be noted that such servitudes are today given validity by the bye-laws of certain village committees.¹

Under the Thesawalamai, any fruits of a tree which requires care and cultivation, and which overhang a neighbour's land, belong to the owner of the tree, but fruits of trees which do not require care and cultivation, such as tamarind, ilupe, and mangos, and which overhang another's land belong to the other. The Roman Dutch Law on this point, however, is not the same.

In *Kandasamy v. Mylvaganam* it was contended on the authority of the Roman Dutch Law that where the branches of a tree which requires care and cultivation, overhang a neighbour's land, and bears fruits, the neighbour could lop off the branches if he so desires, but it was held that the Thesawalamai applied and that the neighbour had no such right.

The correctness of the above decision was later doubted by Akbar J., in *Sundam v. Sinnetamby*² and he referred the matter to a Bench of two Judges in the way of re-considering the law fresh. The Divisional Bench, consisting of two judges, affirmed the correctness of the ruling in³ *Kandasamy v. Mylvaganam*. The owner of a tree is not entitled to enter as adjacent land

1. (Tambiah - p. 261)

2. (1935) 37 N.L.R. p. 324

3. 37 N.L.R. p. 327

belonging to another in order to gather the dry leaves which have falls from his tree.¹

In the Northern Provinces, there is also a custom which permits a landowner, the servitude of crossing into a neighbour's land for fencing class. The Northern Province being a land of ola fence, it is not uncommon for this custom which permits the land owner to cross over to his neighbour's land for screening his fence, to exist. This custom is inveterate and has the force of law.²

1. (1960) 62, N.C.Q. 465 at 467

2 vide Chinnappah v. Kanakar (1910) 13 N.L.R p. 157

CHAPTER XVIII

THE LAW OF PRE-EMPTION

The law of pre-emption, as found in the Thesawalamai, is one of its chief characteristics. It was thought that pre-emption was a concept introduced by the Muslims who settled down in Ceylon. It is submitted that this view is erroneous since the law of pre-emption was known to the ancient Tamil customary law.¹

The Roman Dutch Law also contains provisions relating to the law of pre-emption under the title *jus retractus*. The right of pre-emption, as defined by Mahmud J. in Gobind Dayal v. Iniyatullah,² is a "right which the owner of a certain property possesses as such, for the quiet enjoyment of that property, to obtain, in substitution for the buyer proprietary possession of certain other immovable property, not his own, on such terms as those in which such latter immovables property is sold to another person".³

The right of pre-emption is not the same thing as dominium. Hence if an action under section 247 of the Civil Procedure Code is brought between the pre-emptor and the vendor, the former need not plead in reconvention the right of pre-emption. If he fails to plead this right in a later action for pre-emption, the decree in the former case cannot be pleaded as *Res Judicata*.⁴

The pre-emptory right, however is a right in *rem* and, therefore, is not

1. For a fuller discussion, see Tambiah cap. 21

2. (1885) I.L.R. 7 All. 775 at p. 869.

3. Wijewardene J., in Kathigesu v. Parubathy (1945) 46 N.L.R.162

4. vide Murugesu of Mutur v. Thambipillai et al (1946) 34 C.L.W. p.57.

wiped out by a partition decree.¹ A more correct definition may be attempted.

The right of pre-emption known to Thesawalamai, in the Northern Province, may be defined as the right recognized by the Thesawalamai over immovable property situated in the northern province of Sri Lanka by which a co-owner, co-sharer or adjacent landowner, who has the mortgage of the land in question, has the right to demand that the seller sell it to him at a price which any *bona fide* purchaser is prepared to pay for the same as the owner wishes to sell the same.²

In analysing this definition, the following elements may be noted.

1. It is a right over immovable property situated only in the Northern Province. It does not matter who the owner of the property is - whether such a person is governed by the Thesawalamai or not. This right exists over all immovable property situated in the Northern Province.
2. This right is given to co-owners, partners and adjacent landowners who have the mortgage.
3. It only arises where the co-owner wishes to sell the land or his share of the land. Hence, where the transaction is in the nature of a gift, dowry, bequest or charity or bequest by will, pre-emption does not arise. Furthermore, there must be a voluntary sale. Hence, if the property is sold by compulsory sale, the right of pre-emption does not arise. On insolvency, the property vests absolutely in the assignees and hence in any sale be the said assignee, the right of pre-emption does not arise.
4. Before the right could arise, there must be a valid sale. There must be a fee for of the seller's interest. Hence, pre-emption does not lie where the sale is an invalid one. Thus where a sale does not deprive one of all his proprietary rights, but leaves certain reversionary interests, then the law of pre-emption does not apply.

There should be a sale for the right of pre-emption to be available. In *Kandasamy v. Kumarasinghem*,³ it was held that the sale of a land to an unincorporated society was not a sale as it was not a juristic person. One can sell or gift a property to an unincorporated society what has ascertained

members.¹ It is submitted that it would have been preferable if the Supreme Court had, in this case, sent the case back to ascertain the membership of the association with a direction to the effect that if there were such members than it was a sale to them and the right of pre-emption recognized in that case.

Where on the face of a deed, a transaction purports to be an exchange a Court is not precluded from hearing evidence and heeding that the transaction was in fact a sale and coming to the conclusion that the right of pre-emption arises.² It is a moot question whether a genuine exchange is not a sale for pre-emptory right to be recognized.

Persons entitled to the right of pre-emption

The Dutch and Tamil version of the Thesawalamai Code gave the right of pre-emption to four classes of persons, viz. heirs, partners, those neighbours whose lands are adjacent to the said land, and those who have the same in mortgage. As a result of a wrong translation, the Thesawalamai Code, when published in the English Language, gave the right only to heirs, partners and neighbours whose grounds are adjacent and who have a mortgage over the property in question.³ In this case, it was contended that the Dutch version should be adopted, but it was held that the English version was the authorised version and should, therefore, be adopted by the Courts. The same view was taken by the Divisional Court in *Sabapathy v. Sivapragasam*.⁴

Hence the right of pre-emption applied to only three classes of persons, namely, to heirs co-owners and to adjacent landowners who had a mortgage over the land in question. The term 'heir' can be misleading at times. Nobody can be said to be an heir until the person is to whom he is heir is dead. This point was taken up in *Ponniah v. Kandiah*,⁵ where it was contended that person who would be the heir of another the vendor cannot, during the lifetime of the vendor, sue for pre-emption since she is not the heir. The heir, in this context, was construed to mean a person who would be an

1. vide *Vyramuttu v. Periatnamby* (1929) 30 N. L. R. 492; for further discussion vide *Tambiah* 287 et seq.)

2. *Tambiah* 292.

3. (1960) 63 N.L.R. 193.

1. vide *Bourne v. Keane* [1919] AC 815; *Wray v. Wray* [1892] AC 100; *Maugham v. Sharpe* (1264) 34 L.J.C.P.19.

2. *Ponniah v. Velupillai* (1948) 60 N.L.R. 135

3. vide *Tillainathan v. Ramasamy Chetty* 4 N.L.R. p. 328.

4. (1905) 8 N. L. R. 65.

5. (1920) 21 N.L.R. 27

heir had the vendor died and, therefore, the contention raised in Ponniah v. Kandiah was rejected.

Co-owners

The next group of persons entitled to pre-emption rights are said to be partners - which meant co-owners.¹ A Co-owner is one who has an undivided share in the property² and is a person who has no *pelnum dominium* over the land in question over a share but has a real right in the nature of a servitude.³

It does not apply where co-ownership has ceased or where the co-owners possessed divided lots and presented to the same⁴ or where the co-owner's right of pre-emption is extinguished by a decree of petition entered in respect of the common property. The right of pre-emption cannot defeat the right of a *bona fide* mortgagee for value whose interests has been created before the right of pre-emption was assessed by a Court of Law.⁵

Adjacent Landowners who have a mortgage

The third class of persons who are entitled to pre-empt under the old law are adjacent landowners who had a mortgage over it. Both conditions must exist, namely, a person who wishes to bring a pre-emption action must be an adjacent landowner and also must have a mortgage over it, although not necessarily an *otti* mortgage known to the Thesawalamai.

Preference amongst persons entitled to pre-emption

Difficulty arose when all three classes of person existed, and the vendor sold a share of his property to a third person, who is a stranger. In such a case, the question arose as to who, amongst those three classes of heirs, was entitled to preference, to claim the right of pre-emption.

1. Seevaratnam v. Sabapathi 2 Times L.R. 139 at 140

2. vide Tshiar v. Chelliah 8 CWR 1

3. Kathiresupillai v. Canagasabai (1918) 20 N. L. R. 478.

4. Velupillai v. Thuraiappah (1966) 69 N.L.R. 392

5. Sivapragasam v. Vellaiyan (1954) 55 N.L.R. 298, Vyrarnuttu v. Periyathamby (1929) 30 N.L.R. 492 overruled.

In Ponniah v. Kandiah,¹ it was held that there was no preference amongst these three classes of heirs who are entitled to pre-empt, and, therefore, they were equally entitled to bid for the property - the highest bidder being naturally entitled to the property.

Pre-emptors who are under disabilities

Under the Roman Dutch Law, a married woman was regarded as a minor. The Matrimonial Rights and Inheritance Ordinance recognized her right to separate property but she never held the status of a *femme sole*. It is the Matrimonial Rights and Inheritance Ordinance of 1923 which conferred this status on her. Since both these Ordinances do not apply to persons governed by the Thesawalamai, a woman governed by the Thesawalamai is not a *femme sole*. The question does arise as to whom the notice of pre-emption should be given by a vendor before he could sell the property to a stranger. Notice given to her as well as to her husband would no doubt be sufficient. The wife who wishes to bring a pre-emption action had to be assisted by her husband.²

But the right of pre-emption being a right that is solely hers, the said notice must be given to her. Hence, a husband cannot claim the right of pre-emption if the wife refuses to claim the same.³

A Minor

If the person entitled to notice is a minor, notice of the intended sale cannot be dispensed with, under and in terms of the Thesawalamai Code, since it should be given to the natural guardian of the minor. Hence, if the father is alive, he is the natural guardian, and failing him, the mother becomes the natural guardian. In Ramalingam Chettiar v. Mohamed Ajwad⁴ it was held that where the obligation to warrant and defend title is on a minor, then, notice given to the mother, who is the natural guardian, is sufficient. By a parity of reasoning, when the pre-emptory right is vested in a minor, the notice given to a mother, if the father is dead, is sufficient.

If the father and mother are both dead, then the notice could only be

1. (1920) 21 N. L. R. 327.

2. vide per Bonser C.J., in Tillainathan v. Ramasamy Chetty (1900) 4 N.L.R. 328 at 337

3. *ibid*.

4. (1938) 41 N. L. R. 49.

given to a natural guardian. Where the pre-emptor is a minor and the vendor is his natural guardian the vendor's knowledge of the sale should not be deemed to be sufficient notice to the minor.¹

Means to purchase

In earlier cases it was held that a pre-emptor should prove by proctors evidence that he had the means to buy the undivided share at the time of the sale to another person or in such cases the seller need not give any notices to the pre-emptor,² but this view was rightly rejected in later cases as there is no such rule in Thesawalamai.³

Lunatic

If the person entitled to notice is a lunatic, it is submitted that the same course must be adopted.

Notice of Sale

The Thesawalamai Code, which was enacted during the Dutch Regime, required that one month's notice must be given to persons who resided in the village, three month's notice must be given to persons who resided in the same province but out of the village, and one year's notice must be given to persons who are outside the province.⁴

As regards the form in which notice must be given, there was endless trouble during the Dutch period. To obviate these difficulties, it is said that Commandment Bloom (of blessed memory) introduced the formal notice based on banns. There was publication of banns in the Dutch Church every Sunday. The Dutch whose zeal for proselytizing was well known, therefore, ordered that no sale of land could take place unless the intention to sell was published on three successive Sundays at the Church to which persons belonged. It must be noted in this connection that, during the Dutch period, all the Jaffna Tamils were Christians, except a very few who were characterised as 'pagans'.

1. *Mangaleswary v. Selvadurai* (1961) 63. N.L.R. 88

2. *Ramalingam v. Mangalaswari* (1952) 55 N.L.R. 133, *Velupillai v. Pulendran* (1951) 53 N.L.R. 472

3. *Ramanathan* (1962) 64 N.L.R. 289; *Mangaleswari v. Selvadurai* (1961) 63 N.L.R. 289.

4. Thes. Code VII.1.

During the British period, this practice was abandoned and a new form of publication, known as publication and schedule, was introduced. The exact date of this introduction is uncertain but Joseph Cuffe C. J., states that this custom originated in 1806. It did not originate in ancient custom but in Dutch practice.¹ During the Dutch period, schedules were insisted upon in cases of transfer, otti mortgage, division of hereditary property, donation and all alienations relating to land. The Headman was under a duty to publish such alienations on three consecutive Sundays and thereafter was obliged to issue on certificate which stated that there was no publication and thereafter gave a description of the land from the Thombu or the land registry. If notice was given in the aforesaid manner, persons who were entitled to pre-empt and who did not raise objections were disentitled to pre-empt and the headman granted a document known as the schedule.

Notice of publication of schedule received legal sanction by Ordinance No. 1 of 1842 but Ordinance No. 4 of 1895 repealed so much of the Thesawalamai prevailing in certain parts of the northern province as required publication and schedule of intended sale or other alienation of immovable property and, with the abrogation of this provision, the form and duration of notice, which is necessary in pre-emption actions, was entirely regulated by the decisions of the Supreme Court.

No particular form of notice was insisted upon after Ordinance No. 4 of 1895 repealed so much of the Thesawalamai which required publication and schedule in the case of intended sale of immovable property.

The notice must be sufficient to indicate to would-be pre-emptor the identity of the property that is to be sold. The onus was thrown on the pre-emptor to prove that he was a person entitled to pre-empt the share of land, that the land had been sold to a stranger and that no notice had been given to him of the sale. The Court held that the onus was on the pre-emptor to prove that he did not receive notice.²

Proving a negative is not always easy. In *Kathiresu v. Casinadar* (supra) Jayawardene J., expressed himself as follows: "The plaintiffs have therefore proved that they received no formal notice and had no knowledge of the

1. M. 452.

2. vide *Kathiresu v. Casinadar* (1923) 25 N.L.R. 331

sale or I should say that the burden was on the defendants to prove that they either gave the plaintiff formal notice or that the plaintiffs had knowledge of the intended sale and did not have the power to exercise the right of pre-emption. In this case the plaintiff undertook the burden". This case, therefore, is no authority for the proposition that the burden of proving notice is on the pre-emptor who brings an action. In *Vyramuttu v. Periyathamby*,¹ it was again expressed to an obiter dictum that the burden was on the pre-emptor to prove that he had no notice.

The decisions in these rulings would be justified on the footing that a person who comes to Court and wishes to have relief must prove all facts necessary to obtain the relief. In view of section 101-103 of the Evidence Ordinance.

The Duration of the Notice

The provisions of the Thesawalamai Code regarding the requirement of notice of a month, three months and an year, as the case may be, as referred to earlier, became obsolete and it was held in *Suppiah v. Tambiah*² that all that was necessary was reasonable notice.

Price

Several views were expressed regarding the that has to be paid by a person who wishes to pre-empt. In *Seevaratnam v. Sabapathy*³ it was held that it should be a reasonable price. In *Suppiah v. Tambiah*⁴ the view was taken that it should be the market value. In another case⁵ it was held that the highest price which any other person offers for the land should be paid. This view was adopted in *Mylvaganam v. Kandiah*⁶ and was followed in later cases.⁷

1. (1929) 30 N.L.R. 492

2. (1904) 7 N.L.R. 151

3. 2 Times 142

4. *supra*.

5. vide Morgan's Digest p. 27

6. (1930) 32 N.L.R. 211

7. *Navaratnam v. Sithambarampillai* 29 C.L.W. p. 74 45N

The Subject-Matter of Pre-emption

A pre-emptor must take the whole of the interest that is sold. He could not ask for only a share of such a property i.e. he could not ask for pre-emption of only a share.¹

The right of pre-emption is not available if the property is sold to the classes of persons who are entitled to pre-empt or if the right is waived or if the pre-emptor releases the seller from his obligations to sell to that person, or if the pre-emptor releases the seller from his obligations to sell to that person, or if the pre-emptor had already lost his interest by selling his share of the land to a third party, or the sale becomes unenforceable. It could also be lost three years after the cause of action arises. Hence, the right would not arise if the action is brought three years after the transfer. Where there is concealed fraud, prescription will only start running from the date when the fraud is known to the plaintiff and, therefore, when the vendor and the vendee get together and practice a fraud on a person who is entitled to pre-empt, the right subsists within three years of the time when the person who is entitled to pre-empt comes to know of the sale.

In a pre-emption action, an interesting question arose as to the valuation test that has to be applied to bring an action in the District Court. The question arose as to whether the value of the land on the date of the action or that value as stated in the deed of sale should be considered.

In *Kathirgesu v. Parubathy*² it was stated that it was the value indicated in the deed of sale that should determine the monetary jurisdiction of the Court, to entertain this action. The parties to a pre-emption action are the seller and the purchaser. If the purchaser has resold it to another, all three may have to be joined since the right is in the nature of a real right.

The form of decree for pre-emption was set out in section 200 of the Civil Procedure Code. From its terms, it was clear that the pre-emptor did not need to deposit the amount in Court before he filed the action, but could deposit the money during the period ordered by Court.

An action for pre-emption is an interest in land and thus no leave was necessary from the decision of the Court of Requests where the amount involved is less than Rs. 300/-.

1. vide *Surgu Prasad v. Munshi* I.L.R. 6 All. 423.

2. 46 N. L. R. 162.

It was contended that the right of pre-emption was not available to a person who did not have the right to purchase the property at the time at which it could have been offered to him.

This was an undue extension of Thesawalamai as it involves the fallacy that only persons who have ready cash at the time the notice of sale is given could purchase such a property. A person may find the money by way of loan etc., to purchase such an interest. Thus the Privy Council reversed this view and held that it is not necessary that a person should have sufficient money to buy the property at the time it was offered for sale.

Miscellaneous matters relating to Pre-emption

In *Nagaratnam v. Channugam*,¹ where co-owners divided the property amicably by deeds and possessed them as separate lots, one of the parties was not entitled to bring an action for pre-emption.

Where there is nothing in a plaint to show that a pre-emption is prescribed, it will be wrong to reject the plaint where pre-emption is pleaded on the facts.²

Since under the Pre-emption Ordinance heirs can claim pre-emption and bring an action for pre-emption, the word 'heirs' has to be interpreted as 'potential heirs'.³

Two or more co-owners can join in one pre-emption action and there will be no misjoinder of parties and the cause of action will be as if it is based on a breach of contract.⁴

1. (1965) 69 N.L.R. 389

2. *Achukutty v. Krishna* (1965) 69 NLR 540.

3. *Markandu v. Rajaratnam* (1966) 71 N. L. R. 316.

4. *Thangammah v. Kanagam* 57 NLR 548.

CHAPTER XIX

THE THESAWALAMAI PRE-EMPTION ORDINANCE

The law of pre-emption was very defective in many respects and therefore the Thesawalamai Commission sought, inter alia, to change the law of pre-emption as it existed under the old law. In order to give effect to the recommendations of the said commission the legislature introduced the Thesawalamai Pre-emption Ordinance No. 59 of 1947 which amends and consolidates the law of pre-emption relating to lands affected by the law of Thesawalamai. The object of the Ordinance was to grant speedier and more effective remedies to the pre-emptor and to facilitate proof in pre-emption cases. It made radical changes in various matters connected with the law of pre-emption and pre-emption cannot be exercised except in accordance with the provisions of that Ordinance,¹ which came into operation on 3.7.1947. The Ordinance limited the right of pre-emption to two classes of persons, viz. Co-owners and co-heirs.²

Co-owners are defined as persons who are co-owners of the intending vendor of the property which is to be sold. Heirs are defined as persons who on the intestacy of the intending vendor, will be his heirs. The term 'heir' further received a restrictive meaning so as to encompass descendants, ascendants and collaterals up to the third degree of succession and includes children, grandchildren and great grandchildren parents, grandparents on both maternal and paternal sides and great grandparents on all sides; brothers and sisters, whether of the full or of the half blood; uncles, aunts and nephews and nieces both on the maternal as well as paternal sides and whether of full or of half blood.

1. vide section 3 of Ordinance No. 59 of 1947

2. section 2(1).

In *Markandu v. Rajadurai*¹ it was held that the word "heir" in section 2 denotes persons who would be intestate heirs, should the transferor die at the moment of transfer, and therefore only such heirs can claim pre-emption. This is an undue restriction on the operation of section 2. In *Ponnadurai v. Sithambarapillai* and another² the view was taken that the word "heirs" must be given a natural meaning and meant those who are potential heirs of the vendor upto the third degree in the case of intestacy and means all descendants, ascendants and collaterals upto the third degree. It was held that the legislature intended to give the right of pre-emption to all categories of persons who could potentially be regarded as heirs at the time of the death of the vendor who are enumerated in section 2(a) to (d) of the Thesawalamai Pre-emption Ordinance. It is submitted that the view expressed in the latter case is the better view.

A person who claims to come within section 2 (b) of the Thesawalamai Pre-emption Ordinance No. 59 of 1947 must first satisfy the condition that they would be heirs of the intending vendor if they should die intestate and they should satisfy the condition that they are descendants, ascendants or collaterals within the third degree of succession.³

It further enacts that the right of pre-emption is not to be exercised except in a case where the property which is to be sold consists of an undivided share or interest in immovable property and is in no case permitted where such property is held in sole ownership by the intending vendor.⁴

Notices of Sale

Under the old law, the law governing notice of sale was the source of fruitful litigation. Considerable time was wasted to prove notice orally. Many a person who sold property to spite his pre-emptor falsely alleged that he did not receive notice. To obviate these difficulties, section 5 of the Thesawalamai Pre-emption Ordinance enacts:

- 1) "Notice of an intention of proposal to sell to any person not entitled to the right of pre-emption under this Ordinance, any prop-

1. (1957) 58 N.L.R. 394

2. S.C. 92 (F)/64 D.C. Pt. Pedro 6030, S.C. minutes of /1966

3. *Markandu v. Rajadurai* 58 N.L.R. 394.

4. Vide. section 4

- erty to which section 4 applies shall be signed by the intending vendor before a notary. The notice shall be attested in triplicate, but the registration of it shall not be obligatory.
- 2) The notices shall set out the actual price offered by the prospective purchaser and it shall not be necessary to give the name of the prospective purchaser.
- 3) A certified copy of the notice must be forwarded forthwith by the intending vendor to one of the officers enumerated in the 2nd column of the schedule in the Ordinance, against whose name the division in which the land is situated is shown in the 1st column of the schedule.
- 4) The officer to whom the certified copy is forwarded shall record the particulars set out therein in a register to be kept for that purpose and shall cause such certified copies to be posted immediately on the notice board of his court or office, as the case may be.
- 5) Certificate under the hand of the officer that the notice has been duly posted on his notice board shall be conclusive evidence of the publication of the notice for the purpose of the Ordinance.

The necessity on the part of the intending vendor to see that the notice sent is in fact published in the manner set out in the Ordinance was stressed in *Kasinathan v. Thamotherampillai*.¹ In this respect law reform is necessary. If there is failure on the part of the offeree, to fulfil the requirements as to notice, as required by law, it cannot be said that he is deemed to have published the notice.

In view of these provisions, it became necessary to amend the Prevention of Frauds Ordinance.² This was done by Ordinance No. 60 1947. Under the provisions of this Ordinance the documents which require notarial attestation are specified.

Procedure for enforcing the right of pre-emption

The Ordinance also provides for the procedure to be adopted by a pre-emptor who wishes to complete the purchase by private treaty, if the intending vendor is prepared to sell the property to him. In such a case, within

1. (1968) 63 N.L.R.241

2. Cap 5

three weeks of the date of publication of the notice under section 5, any person to whom the right of pre-emption is reserved by this Ordinance may either tender the amount said in such notice and buy the property from the intending vendor or enter into an agreement to buy it.

If the intending vendor sells the property within three weeks of the date of notice, such a sale is declared null and void.¹

In *Joseph v. Joseph*² it was held that when the seller quoted a fictitious price in the notice given to a person who is entitled to pre-empt the latter should tender the amount indicated in the notices. It is submitted, that in view of the present Ordinance, what should be tendered is the actual market value.

If the property remains unsold, the remedy of the intending purchaser is indicated in section 7 of the Ordinance. It confers new rights on the intending pre-emptor because under the earlier law, if the intending vendor did not sell the property, the pre-emptor had no right to force him to transfer the same to him. Section 7 enacts as follows:

"If a tender made under section 6 is not accepted by the intending vendor and if the land remains unsold, the person making that tender may, on condition that he has first deposited in court the amount stated in the notice, and tendered by him to the intending vendor, apply to court within the period specified in section 6 by way of petition, duly stamped and verified by affidavit for an order directing the intending vendor to sell the land to the applicant."

When the applicant alleges in his petition and affidavit that the amount stated in the notice by the intending vendor is fictitious, the deposit of such smaller sums as may be alleged in the petition to be a reasonable price for the market value of the land shall be deemed to be sufficient compliance with the conditions in sub-section 1, of section 7 as to the deposit of money in court.

In the event of a smaller sum being deposited in terms of sub-section 2, the Court shall, without prejudice to such issues relating to the value of the

1. vide section 6(2) of Ordinance 50 of 1947.

2. (1962) 63 N.L.R. 212

land as may have been dealt with at the inquiry into the petition, hold a preliminary, inquiry as to the sufficiency of the sum deposited by the applicant hearing such evidence as may be necessary for this purpose.

Any order, in a summary way, under these provisions are declared final and conclusive and where such order directs any further sums to be deposited in compliance with the order shall be a condition precedent to an issue of an order interlocutory, to the notice of process in the matter of petition.

All petitions under this section are disposed of under the summary rules of procedure set out in section 24 of the Civil Procedure Code. In the event of non-appearance or other default of the intending vendor the court shall, if after due inquiry, if satisfied that the application should be allowed, execute a conveyance of the property to the applicant and the provisions of section 333 of the Code shall apply *mutatis mutandis* to any conveyance so executed.

Any conveyance of property in contemplation of the proposed sale executed by the intending vendor after the service on him of an order nisi or interlocutory order before the final order, if made in any proceeding under this section is null and void and is of no effect whatsoever in law.(Section 7)

Procedure to enforce the right when property has all been sold

If the property had already been sold, a person who is entitled to pre-empt may institute an action on any of the following grounds. It may be proved that notice as required by section 5 was irregular or defective. A notice is said to be defective when it does not comply with the provisions of law or when the notice is not notarially executed. It is submitted that the notice is irregular when it does not conform to the other requirement as laid down in section 5.

In such an action, it may be proved that the price set out is fictitious and not fixed in good faith. It may also be proved that at the time of, and three weeks after the publication of notice, the person seeking to enforce the right is absent from the district and after a reasonable time after the lapse of the said period, of three weeks, of the proposed sale, he tendered to the intending vendor, the purchase amount as stated in the notice and that such tender was not accepted.

Hence, after this Ordinance, if a person absents himself intentionally to avoid and accomplish the sale in another district of his land, the pre-emptor is not without a remedy.

The Ordinance also provides a time limit for enforcing the right of pre-emption. It restated the old law that no right to pre-empt exists if the actual purchaser of the land is also a person who at the time of the purchase had the right of pre-emption of the property purchased by him. This is the old law, but under the Ordinance the persons entitled to pre-empt became a more limited class. It also provides that if more than one year has elapsed from the date of registration of the purchase deed of transfer no right of pre-emption lies under section 9(2). This provision has brought to an end the situation, prevailing under the old law, where endless litigation resulted several years after the property had changed hands.

Where the deed of sale is registered in the wrong folio a person is not prevented from bringing an action, even if a year had elapsed from the date of registration of sale, if the registration should be in the correct folio but has not been so registered. In such a case the connecting up of the wrong folio to the correct folio subsequently does not connect the wrong folio to the correct folio with retrospective effect.¹

It also provides that no precept or order for the service of notice of summons should be issued in any proceedings or action for enforcing the right of pre-emption until proof is furnished in court for the registration of proceedings or an action as *lis pendens* in accordance with the provisions of the Registration of Documents Ordinance. (Section 10) It also permits the Court to allow a plaintiff in a pre-emption action to deposit the purchase amount set out in the notice under section 5 at any time after the institution of the action and if the plaintiff makes default in depositing the money in such period, or further periods not exceeding three months, in the aggregate, the court is empowered to strike off his action from the roll of pending cases. (section 11) It also provides that the minimum price payable by the plaintiff to be deposited before the action could proceed. Section 12 enacts that no person seeking to enforce the right of pre-emption by way of petition or by regular action shall be permitted to take over the property for a lesser amount than that stated in the notice given under section 5 or recited as consideration of the deed of transfer executed by the vendor. But if the amount so stated is proved to the satisfaction of the Court as fictitious, the Court may then ascertain the actual price paid and the market value and allow the property to be pre-empted by the plaintiff at the price actually paid for

1. Achchikuddy v. Krishnan (1965) 69 N.L.R. 520

or at the market value, whichever of these is the larger. This section again settles the controversy as to what the actual market should be, in pre-emption cases.¹

A genuine exchange is not a sale and the right of pre-emption does not apply to such a transaction.²

No preference is given among persons who are entitled to pre-empt, when all have an equal right to pre-empt and in the event of a competition among those entitled to pre-empt, the Court may accept the highest offer made by any of them, if such offer is also larger than the actual price paid or the market value, whichever of it is the larger. (section 13) The section also repeals so much of the provisions of the Thesawalamai relating to the publication of intended sales or other alienation of immovable property affected by the Thesawalamai in the Northern Province of Ceylon which is inconsistent with the provisions of this Ordinance. (section 14)

Defence in an action for pre-emption

If there is a sale to a person who has the right to pre-empt, such as a co-owner, no action for pre-emption will lie whereby amicable partition and prescription could result in co-ownership coming to an end.³ Where a co-owner entitled to a share in the common property is limited by rights of occupation to the exclusion of others much as a life interest then such a co-owner cannot claim to pre-empt as he has no plenum dominion over the common property.⁴

Earlier it was held that the right of pre-emption does not apply to a person who has not got sufficient money to buy the property at the time he was entitled to pre-empt.⁵ *Mangaleswari v. Sellathurai*,⁶ the Privy Council overruled *Velupillai v. Pulendran* and held that where the pre-emptor's right to pre-empt in an action is established positively he need not establish that he would have had sufficient money to buy the property at the time when the required notice was due to be given. After referring to the old law of Thesawalamai and the Pre-emption Ordinances, they took the view that this

1. section 12

2. *Ponniah v. Ponnai* 60 N.L.R. 415

3. *Jayaratnam v. Shanmugam* 69 N.L.R. 389

4. *Sivagurunathan v. Visalatchy* (1954) 56 N.L.R. 376

5. *Gratiaen J., in Velupillai v. Pulendran* (1951) 33N/472

6. (1952) 63 N.L.R. 88

was an undue extension. In *Jaganathan v. Ramanathan*,¹ a Bench of 5 Judges held that in an action for pre-emption under the Thesawalamai Pre-emption Ordinance the plaintiff need not establish that if the prescribed notice had been given, he had sufficient means at the material time to buy the share which he was entitled to pre-empt. Basnayake C.J. (with whom the others agreed) held that they were unable to uphold the submission of the learned counsel who submitted that there was no cause of action unless the plaintiff had the means to purchase the share of her interest. His Lordship held that the cause of action, as defined in the Code, is wide enough to include the omission or failure of the vendor to give the notice required by the law. The obligation to give those entitled to pre-empt the opportunity to do so is so implicit in the law and the failure to give them that opportunity by giving the prescribed notice can rightly be regarded as a refusal to fulfil the obligation.² It was been held that in an action to enforce the right of pre-emption in the law of Thesawalamai in respect of an undivided share of a certain land which has been sold by a co-owner in September 1937 without prior notice to the pre-emptor that was not fundamental to the cause of action.³ In such a case the pre-emptor should adduce positive proof that he had in fact received the requisite notice, and that he had sufficient means to purchase the property at the time at which it was sold. This overruled *Valupillai v. Pulendran*. It was held that neither the Roman Dutch Law nor the Muslim Law is part of the law of Thesawalamai but in regard to a question relating to pre-emption, it is permissible to derive assistance from the law obtaining in these systems which are not in conflict with the principles of Thesawalamai. The case further decided that the point of time at which the cause of action arose is the time which the pre-emptor came to know of the sale. This could be after a considerable time after the sale and still further from time at which the pre-emptor received notice. It was also decided that where the pre-emptor is a minor and the vendor is the natural guardian, the vendor's knowledge of the sale should not be imputed to the pre-emptor. Before the pre-emption Ordinance came into operation, knowledge on the part of the person who is entitled to pre-empt that the property had been sold was held to have barred his right to claim an action for pre-emption on the ground of waiver. The specific point to be remembered in this case is that the knowledge of the natural guardian is not the knowledge of the minor if the minor was the person entitled to the right of pre-emption. But after the amending Ordinance came into operation,

1. (1962) 64 N.L.R. 289

2. vide at p. 292

3. (1952) 63 N.L.R. 88

knowledge on the part of the person who is entitled to pre-empt, that the property had been sold, was held to have barred his right to claim an action to set aside a deed by person entitled to pre-empt on the ground that the requisite notice has not been given defences such as estoppel, waiver and acquiescence are not so easy to prove.¹ However, if there is no sale the right of pre-emption does not arise.

Thus, in *Kandasamy v. Kulasekeram*,² it was held that an unincorporated society, not being a juristic person, had no legal capacity to acquire property. Therefore, a sale of immovable property in favour of an unincorporated society or association (in the instant case, a village welfare society) cannot pass title if it is not clear whether the transferor meant to benefit the present members of the society as individuals or to benefit the society as a quasi-corporation. In such a case, there is no sale if the owner of the property is not entitled to bring an action to enforce the right of pre-emption in section 8 (1) of the Thesawalamai pre-emption Ordinance.³ The price stated in the notice should not be fictitious.

In *Joseph v. Joseph*,⁴ it was held that price stated in the notice published by an intending vendor in purported compliance with section 5, of the Thesawalamai pre-emption Ordinance 59 of 1947, is fictitious and does not represent the true market value of the land. Section 6 contemplates as a valid tender for the purpose of the Ordinance only a tender for the stated price despite the fact that such a price is fictitious. In this case, it was pointed out that the machinery provided by the Ordinance is unworkable. In *Kasinathar v. Thamothersampillai*,⁵ it was held that when notice of sale immovable property is given by an intending vendor in terms of section 5 of the Thesawalamai Pre-emption Ordinance it is his duty to see that the officer to whom the notice is sent in fact published the same. The notice under section 5 cannot be deemed to have been given for the purpose of section 8, if there is a failure on the part of the officer to whom the notice is sent to publish the same in the manner prescribe in subsection 4 of section 5.⁶

Misjoinder of parties bringing a pre-emption case is a good defence. Therefore where two or more co-owners brought one action it was held that

1. *Agtheasu v. Ulkesa* (1966) 70 N.L.R. 80.

2. (1962) 63 N.L.R. 193

3. Cf. (1949) 52 N.L.R. 230

4. 63 N.L.R. 272

5. 63 N.L.R. 241

6. *Casinathar v. Thamothersampillai*, 3N.L.R. 244.

there was a misjoinder of parties in a cause of action as each persons bringing such an action had a separate cause of action.¹

In *Arumugam v. Somasundaram*,² it was held that where, in an action for pre-emption, the Secretary of District Courts was ordered by the Courts to execute a conveyance in favour of the pre-emptor on account of the wilful failure of the defendant to do so. The title vests in the pre-emptor from the date of the Secretary's conveyance and not from the date of the decree. Where, in such an action, the Plaintiff obtains a decree followed by the D.C. Secretary's conveyance in his favour but subsequently suffered damages by reason of an obligation to pay a mortgage of created by the co-owner in respect of the property in question, during the pendency of the action, and thereafter if the first defendant obtained a re-transfer from second defendant (the vendee) it has been held that the plaintiff was entitled to bring a second action to recover the damages suffered by him during the period of prescription in respect of his claim for damages from the date of conveyance, executed by the Secretary of the D.C.³ Where a co-owner purports to transfer his share of the common property to a stranger in exchange for property belonging to the latter, the Court is entitled to look into the circumstances of the transaction and decide whether or not the alleged exchange is in fact a sale, for the purpose of pre-emption under the law Thesawalamai. The issue also is also relevant as to whether even a genuine exchange can be regarded as sale within the meaning of Ordinance No. 59 of 1947.

In *Aiyadurai v. Kathiresupillai*,⁴ under Thesawalamai when a man has issue by more than one marriage, the children of the first marriage succeed ultimately to the whole of the property acquired by him during the subsistence of that marriage.

In *Dureirajah v. Mailvaganam*,⁵ where several vendors enter into a covenant to warrant and defend title to a land conveyed by them, and the title is subsequently questioned by a third party to an action, it is incumbent on the vendee to give notice to warrant and defend title to each of his vendors whom he seeks to hold them liable under the covenant.

1. *Mangamma v. Kanagaratnam*.

2. (1957) 61 N.L.R. 16

3. *Thamu Ponnai v. Velupillai Ponniah*, (1956) 60 N.L.R. 415.

4. (1956) 60 N.L.R. 493

5. (1957) 59 N.L.R. 540

Accordingly, where a husband and wife governed by the law of Thesawalamai sell immovable belonging to the wife, notice to warrant and defend title must be given to the wife separately if she is to be held liable. In such a case notice to the husband cannot, by virtue of section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance, be constructed as notice to the wife as well.

In *Kasipillai v. Theivanipillai*¹ a gratuity paid to a public servant on retirement from service was held not to constitute part of the *Thedietettam*.²

In *Markandu v. Rajadurai*³ persons who claim to come within section 2 (1) (b) of the Thesawalamai Pre-emption Ordinance No. 59 of 1949 must first satisfy the condition that they would be heirs of the intending vendor if he should then die intestate, that condition having been satisfied, they must also satisfy the condition that they would be heirs of the intending vendor if he should then die intestate, that condition having been satisfied, they must also satisfy the condition that they are descendants, ascendants or collaterals within the third degree of succession. Sansony, J., observed that "Under the law as it stood before the Ordinance passed there was no limitation as to the degree of succession within which heirs who claimed the right of the pre-emption should fall. The Ordinance, however, restricted the right of those who were within the third degree of succession. The reason, I think is because the report of the Thesawalamai Commission, dated 12.12.1929⁴ contained a Commendation that the right should be restricted "to those who would be heirs of the vendor upto the third degree in the case of intestacy.

In *Saravanamuttu v. Nadarajah*⁵ it was said that where the Thesawalamai is silent, the Roman Dutch Law was applicable. The rule of Roman Dutch Law that the surviving spouse may validly sell immovable property of a deceased person in order to pay his or her debts is applicable to parties governed by the Thesawalamai.

In *Soosaipillai v. Soosaipillai*,⁶ a full bench decision of the Supreme Court, it was stated that section 9 & 11 of the Thesawalamai,⁷ applied to the estate of a spouse married before, and dying after, 17th July 1911 (the date of

1. (1936) 38 N.L.R. 187

2. See also, *Seethangani Ammal v. Eliya Perumal* (1936) 39 NLR 87.

3. (1957) 58 N.L.R. 394

4. Sessional paper III of 1930

5. (1955) 57 N.L.R. 332

6. (1956) 57 N.L.R. 529

7. Cap 51

the commencement of the Jaffna Matrimonial Rights and Inheritance Ordinance). It was further stated that section 37 of the Ordinance had no application to such a case.

In *Kumaraswamy v Subramaniam*¹ it was held that the rights of a wife, to whom the Thesawalamai applied, in respect of Thedietettam property acquired by her husband, before the Jaffna Matrimonial Right and Inheritance (Amendment) Ordinance 1947 came into operation, were governed by the section 20 of the principal Ordinance of 1911 and were not affected by section 5 and 6 of the amending Ordinance. If she predeceased her husband subsequent to the date when the Amending Ordinance became operative, the devolution of her share of that property is regulated solely by section 21 of the principal ordinance because the new section 20 has no application to the case: accordingly, the entirety of her vested interest in the property passes to the children of the marriage as her heirs, to the exclusion of her husband. *Shivagurunathan v. Visalatchy*,² a person whose title to a share in a common property is limited by rights of occupation enjoyed to his exclusion by someone else is not a "partner" within the meaning of section 1 of Part 7 of the Thesawalamai³ and is not entitled, therefore, to claim rights of pre-emption. In this context the word "partners" is necessarily confined to co-owners who exercise (or are at least entitled to exercise) plenum dominium over the common property.

Under the Thesawalamai, a dowried daughter loses her rights to her parent's inheritance when the dowry is given subsequent to the date of her marriage.⁴

Where a married woman governed by Thesawalamai instituted an action, and her application for sanction of court to sue alone, unassisted by her husband, was made with the presentation of the plaint, it was held that the date of the institution of the action was the date on which the plaint was filed and not the date when the dispensation to sue alone was granted.⁵

In *Ramalingam v. Mangaleswari*,⁶ a plaintiff sought to enforce a right of pre-emption under the Thesawalamai by claiming to have a sale of land

1. (1954) 56 N.L.R. 44

2. (1954) 56 N.L.R. 376

3. Cap 51

4. *Thesigar v. Ganeshalingam*, (1952) 55 N.L.R. 14.

5. *Piragasam v. Mariamma* (1952) 55 N.L.R. 114.

6. (1952) 55 N.L.R. 133

set aside on the ground that the property had been sold without previous notice to her. It was held that as the plaintiff had insufficient means to purchase the property at the time it was sold the failure to give her notice of the sale was immaterial.

In *Kannammah v. Samugalingam*¹ under section 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance, before it was amended on 3.7.1947 by Ordinance No. 58 of 1947, title to half of the Thedietettam property acquired by a husband vested in his wife immediately upon the acquisition of the property. Such immediate vesting of title in the wife was not consistent with the husband's rights to sell or mortgage the property.

The amending Ordinance No. 58 of 1949, does not operate so as to affect title to property which has already vested in a spouse prior to the date of amendment.

In *Sivapragasam v. Velliyan*,² a co-owners right of pre-emption under the Thesawalamai is extinguished by a decree for partition entered in respect of the common property. *Vyramuttu v. Periyathamby*,³ was overruled by this decision.

A co-owner's right of pre-emption cannot defeat the rights of a bona fide mortgagee for value whose interest had been created before the right of pre-emption was asserted in a court of law.⁴ A Court has jurisdiction to grant relief in the form of a declaratory decree in *quia timet* proceedings when such a decree would accomplish the ends of precautionary justice for the protection even of future or contingent rights. The Court must, however, be satisfied that the declaratory decree asked for in any particular action relates to a concrete and genuine dispute and would if passed, serve some real purpose in the event of future litigation between the same parties.

By a deed executed in July 1944, a wife, to whom the Thesawalamai applied, purported, during the subsistence of her marriage, but without her husband's consent, to convey her separate immovable property. Earlier, in November 1943, the husband had, in the exercise of his right to manage his wife's property, informally leased her interests to certain parties.

1. (1954) 55 N.L.R. 260;

2. (1954) 55 N.L.R. 298

3. (1929) 30 N.L.R. 492

4. *Naganathan v. Velauthan*, (1953) 55 N.L.R. 319

It was held firstly that, under section 6 of the Jaffna Matrimonial Rights Inheritance Ordinance, the conveyance executed by the wife without her husband's consent was void *ab initio*; secondly that although the husband had no proprietary interest in the separate property of his wife, he had other present and contingent interests therein. He was entitled, in the circumstances, to institute action asking for a declaration that the conveyance which his wife had purported to execute was null and void.

Limited interests in Property known to Thesawalamai

In law, a person might have a limited interest, short of full ownership, in another person's land. The Glossators, coined the Latin phrase *jura in re aliena* when these interests could be ascertained, not only against a particular person, but against the whole world. Such limited interests are also known to the Thesawalamai. Servitudes peculiar to this system of law, leases, otti mortgages and pre-emptionary rights belong to this category.

As stated earlier, our courts have taken the view that the principles of Thesawalamai applicable to the above topics are local in character and apply to all lands situated within the Northern Province of Ceylon whoever the owner may be. In *Suppiah v. Tambiah*¹ the Supreme Court took the view that the law of pre-emption applies to sales of all lands in Jaffna whether the vendor of the purchaser is an Englishman, Moor, Tamil or Sinhalese. The Supreme Court rejected the contention that the law of pre-emption applies only to the Tamils governed by the Thesawalamai.

Even the Dutch and the British adopted the view that the "Seventy Two orders" promulgated by the Dutch enjoined (Order 27) all those who "wished to sell or otti any lands, houses, slaves or gardens" to procure the publication thereof for three weeks in the nearest church. The decision referred to, in *Mutukrishna's* work support the rule laid down in *Suppiah v. Tambiah*. It is too late in the day to contend that this part only applies to Tamils governed by the Thesawalamai.

Servitudes

Servitudes are either personal or paretial in Roman Law and on systems based upon it such as the Roman Dutch Law. Paretial Servitude at-

1. (1904) 7 N.L.R. 151

tach to the dominant land. Servitude may be of different kinds. The most important are : the right of way over another's land, the right to lead water, the right to draw water, etc. Many servitudes recognised by the Roman Dutch Law are recognised in Ceylon.

In addition to these, the Thesawalamai recognises servitudes which are peculiar to the Northern Province of Ceylon. The recognition of these servitudes is consistent with the principle of Roman Dutch Law that the list of servitude known to it, is not exhaustive. Servitudes, not known to the Roman Dutch Law, will be recognised by our Courts if their existence can be proved by custom.¹

In the Northern Province of Ceylon, attempts to create certain types of servitude over land have failed for want of proof of certainty and reasonableness of such a usage. In *Vallipuram v. Sandanam*.² It was contended that a landowner who has a coconut land adjoining a field could not plant trees within a margin of four yards from the boundary. It was held that there was no such servitude.

There are certain peculiar servitudes set out in the Thesawalamai Code and still others have been established by custom.

Servitudes of enjoyment of fruits over an over-hanging branch of a tree

Unlike the Roman Dutch Law, in Thesawalamai, if a person plants a tree which requires attention and the branches of that tree overhang his neighbour's land, the owner of the tree has the right to the fruit on the over hanging branch. His neighbour has no right to the fruits nor does he have the right to lop the branches.³

Servitude of crossing fences

Jaffna is a land of fences. The Thesawalamai recognised the right of a person to cross his neighbour's land for the purpose of erecting a boundary fence.⁴

1. (vide *Kawrala v. Kirihamy* 4 C.W.R 187).

2. (1915) 1 C.W.R. 96

3. vide laws and customs of the Tamils of Jaffna - H.W. Tambiah, p. 263 -264

4. *ibid.* p. 265

Servitude of the user of a well

It is submitted that it is possible to have a servitude in respect of the right to draw water from a well provided that the right to do so is exercised reasonably.

Leases

The law of leases in Jaffna is governed by the Roman Dutch Law, the general law of the land. But the Thesawalamai deals with the leasehold known to the ancient Tamils. These leaseholds are similar to the leases in Malabar.¹ The rights and obligations of Landlord and Tenant is regulated. In the absence of agreement, the provisions of Thesawalamai on this matter are followed.

Otti Mortgage

An Otti Mortgage under the Thesawalamai may be defined as a 'usufructuary mortgage of lands situated in the Northern Province of Sri Lanka for a definite sum of money or other legal consideration, on condition that in lieu of interest, the mortgagee should take the produce of the land and that it should be after due notice has been given'.²

The Marumakattayan Law recognises a similar type of usufructuary mortgage and it cannot be a mere coincidence that it is known by the same name. Lewis Moore defines otti under the Marumakattayan Law as follows:³ "An otti may be defined as a usufructuary mortgage the usufruct of which extinguishes the interest, leaving only a nominal rent to be paid to the mortgagor". The same incidents are attached to otti (a leasehold known to the Marumakattayan Law) but, in otti the mortgage has the right of pre-emption. The Marumakattayan Law is, however, subject to certain variations.

The mortgage known as otti was known to the Tamils in the time of St. Sundarar. The hymn of this Hindu saint beginning with the lines *vittu kolvir Otiyalan virumri adipadam*. Cannot be interpreted unless one understands the significance of otti under the Thesawalamai and the Marumakattayan Law. St. Sundarar was pleading for the restoration of his eye. The right of pre-emption in the otti form of mortgage known during the

1. Section 7 Part IX)

2. See Laws and Customs of the Tamils of Jaffna- Tambiah - 275.

time of this saint, is expressed in fictitious language when the saint says, : I willingly surrendered myself and became thy slave forever; and thou has full dominion and plenary control over me. There is no other master to question it, and there is nobody else having any subsidiary rights over this slave, to intervene on behalf of the slave against the doings of the Supreme Master". Sundarar condemns the Deity in the following moving lines ; "the slave has done no wrong. But it pleases thee, my Master, to deprive me of my eyesight. What reason cannot thou assign for inflicting on me the wanton cruelty of depriving me of my eyes? None and therefore thou standest condemned. After so many entreaties from you have restored me one eye, may thou prosper my plenary lord!" the ideas of the 'otti' holder as the supreme owner, having pre-emptionary rights over the subject matter of the otti is described by St. Sundarar in this beautiful stanza.

Otti mortgage, therefore, was known to the ancient Tamils and the incident of 'otti' in St. Sundarar's time, was not very different from what is found both under the Maramakattayan Law and the Thesawalamai.

Although the Dharmasatra recognised a usufructuary form of mortgage,¹ the incidents are not the name as otti. Hence otti was known to the Tamil customary law and its incidents are not influenced by the Dharmasastras.

The leaseholders set out in the Thesawalamai code which imposes the duty on the tenant to give two-thirds share of the produce to the landlord has its counterpart in the Verumpattam lease of Malabar; Lewis Moore, Malabar Law and Customs p. 191 *et seq*) Some of the decisions of the Ceylon Courts have even gone to the extent of holding that the law of pre-emption known to Indian customary law will be presumed to be founded on, and co-extensive with the Mohamdean Law until the contrary is known.²

The researches of Kane and others have shown that otti mortgage was recognised in Indian customary law and was not influenced by the Dharmasastras.³ Kane cites Smrthi texts which prohibit the sale of lands owned by Brahmans to Sudras and Chandalas. Kane further cites texts which recognised the rights of pre-emption is favour of full brothers, sapindas, somanodakas, sagotras (certain classes of heirs under the Hindu Law),

1. adi that was Bhaya - Kane III, p. 430

2. see Mohammedan Law by Tyabji (2nd edition), p. 658 and the cases cited therein.

3. Kane III, p. 496.

neighbours and creditors¹ The law, as contained in the Smrthi works, dates back at least to 1500 years, a period anterior to the Mogul invasion of India. The recognition of per-emption in the Tamil country in St. Sundarar's time, proves that this concept was known to the Tamils before the Mogul influence had penetrated South India.

The Law of obligations as recognised by the Thesawalamai

The Thesawalamai Code does not deal with delicts or quasi-contracts but treats a few contracts which are common in an agricultural community. It also deals with the sale of both movables and immovables. In dealing with the latter, it must be noted that it contains the law of pre-emption which was applied before the Pre-emption Ordinance came into operation. The sale of Goods Ordinance, based in the corresponding English Act, now provides for the law governing sale of goods. The Roman Dutch Law and general statutes apply to the sale of immovables. An interesting point to be noted is that, under the old Thesawalamai a sale of a cow was complete, the moment the dry dung of the animal was given to the purchaser, a characteristic which is common to many archaic systems of law. The provisions of the Thesawalamai in this subject are obsolete today.

A few rudimentary provisions governing pawn, hire of beasts and exchange are contained in the Thesawalamai Code, which are all obsolete. The Provisions that a pawnee who uses for his personal use the ornaments pawned with him without the consent of the pawner forfeits the interest for that period is found in Hindu Law.² The rule of Thesawalamai is that a hirer of a beast need not pay any compensation of damage if the animal gets disabled. The proprietor must consider such loss as accidental. The Proprietor must further supply another animal, if the animal died during the period of the contract without any fault on the part of the hirer. Provisions governing exchange when money was scarce. All provisions are now obsolete.

The provisions governing loans of money contained in the Thesawalamai Code, although now obsolete, gives a student of law an insight into the extent of the influence of the Roman Dutch Law. The limitation that interest should never exceed the capital is found both in Thesawalamai that interest should never exceed the capital is found in Thesawalamai and the Roman Dutch Law.³

1. Kane III, p.496

2. See Colebrooke's Hindu Law, Vol. 1 p. 149

3. Thesawalamai Code IX 1; Vander Linden's institutes p. 219

Where there are several co-debtors, the law of surety-ship as found in the Thesawalamai, allows the creditor to take satisfaction from the debtor whom he meets first. This provision is also found in Hindu Law.

In modern times the of suretyship applicable to person governed by the Thesawalamai are now obsolete. The married Women's Property Ordinance which took away the privileges conferred on a married woman by the two *senatus* Consults, The *senatus Consultam Vellianum* and the *Senatus Consultam authentticasi qua mulier* which prohibited wives from becoming sureties to their husbands do not apply to women governed by the Thesawalamai.

Some of the main concepts of the law of Thesawalamai have been examined. An attempt has been made to show that the Thesawalamai has little in common with the Dharmasastras. Eminent scholars such as Ganapathy Iyer and Maine have found that the Dharmasastras is indebted to the Indian customary Law in developing some of its fundamental concepts. These scholars refer to the Thesawalamai is a pure form of Customary Law of the Tamils who migrated from India. It is unadulterated by the recon-dite mysteries of the Dharmasastras. These scholars are of the view that the joint family system, adoption and marriage as known to Hindu Law take their roots from Indian Customary Law. Scholars like Derrett who have made a profound study of the original sources of Dharmasastras Indian Customary Laws are of the view that Dharmasastra never developed the clear and settled principles of Indian Customary Law and hence to comprehend the Hindu Law, the study of the Dharmasastras and the Indian customary Law helps a scholar to interpret some of the obscure texts of the Dharmasastras.

The study of the Thesawalamai and the customary laws of the Tamils of Sri Lanka and south India will throw abundant light on Indian Customary Law.

The future of Thesawalamai is uncertain. With a stroke of the pen it may be abolished. Legislation may, in the process of amending the Law, exterminate it. Hence this systems of law which has governed the destinies of the Tamils of North Sri Lanka may vanish in the near future.

CHAPTER XX

LEASES

Leasehold known to the Ancient Tamils

When one considered the provisions of the law of Thesawalamai and the history of the Tamils in Ceylon, it is evident that some form of feudal tenure corresponding to the Sinhalese tenure existed among the Tamils at one time. Codrington remarks¹ that the original land system in the Tamil districts was not substantially different from that prevalent in the rest of the Island.

Apart from a system of tenure known to the Tamils it is clear that the conception for a leasehold was known to them. The leasehold known to the Tamils is described in section 7 of Part IX of the Thesawalamai Regulation which reads as follows:- "When any person sows the fields of another without a previous agreement, what quantity the sower shall give from the harvest to the proprietor the *taraviaram*, which signifies the ground duty, and is calculated to be one-third part of the profits, except the tenth part, which is to be given to the proprietor previously. And when the crop happens to fail in the year for which the contract has been made, the sower need not pay to the proprietor the quantity agreed upon; but in case the other inhabitants of the village (in which the sower resides) have all had a good harvest, then the sower of the above description is obliged to pay such a quantity to the proprietor as was agreed upon by him, because in such an event the failure of the crop of the field sowed by him is attributed to his laziness and negligence;

yet, should it happen that he has had a tolerably good harvest and the other inhabitants of his village a bad one, then the proprietor of the ground must be satisfied with the quantity produced by the field, and may not claim anything more from the sower." From this account it appears that lands were leased out for sowing purpose among the ancient Tamils in consideration of a fixed amount of the produce or a share of it. It is curious to note that in case of unwonted sterility the provisions of Thesawalamai and the Roman-Dutch Law are practically the same.

The hire of beasts was also recognised among ancient Tamils,² and the provisions governing this topic have been reproduced in the Revised Legislative Enactments. But in modern times the hire of beasts will be governed by the contract between the party.

LAW OF LEASES IN MODERN TIMES

The law of leases that obtains in the Northern Provinces is the Roman-Dutch Law. The incidents of a lease will be chiefly governed by the terms of the agreement contained in the indenture of lease.² Under the Roman-Dutch Law, in the absence of agreement regarding the rent there is no lease since it is one of the essentials on which the parties should have agreed upon.³ But under the law of Thesawalamai, when fields are rented out and there is no agreement regarding rent, there was customary usage that fixed the rent or its equivalent. Now, in such a case, an action for use and occupation would lie.⁴

1. Thes. Code, Part VI.

2. For a fuller exposition see *Landlord and Tenant in Ceylon* by H.W. Tambiah.

3. See *Landlord and Tenant* by H.W. Tambiah, p.25.

4. See *Landlord and Tenant* by H.W. Tambiah.

1. In *Ancient Land Tenure and Revenue* by H.W. Codrington, July 1938, Government Press, p.54: See also *Ceylon under British Occupation, 1795-1833*, by Colvin R. de Silva - Vol.II.

CHAPTER XXI

PLANTER'S INTEREST

A Planter's interest in the trees planted by him on another's land will usually be governed by the terms and conditions of the contract he has entered into with the owner of the land.¹ A planter's share is generally acquired by a notarial instrument or by prescription. Prescription starts running after the completion of the contract, that is, when the planter has taken the share and has begun to possess it adversely to the owner of the land.² These are not the only methods by which a person could acquire a planter's interest in land. Thus, it is possible for a person to acquire a planter's interest by operation of law and it is with this aspect that a student of Thesawalamai is concerned.

The Thesawalamia Code deals with the rights of a co-owner who plants his land and the rights of a stranger who plants another's land.

THE RIGHTS OF A CO-OWNER

The Thesawalamai Code states:³ "If two or more persons possess together a piece of ground without having divided it and one of them encloses with a fence so much as he thinks he would be entitled to on a division and plants thereon coconut and other fruit-bearing trees, and other shareholders do not expend or do anything to their shares of the ground until the industrious one begins to reap the fruits of his labours, when the other, either from covetousness or to plague and distort, come and want to have a

1. See *Silva v. Cottalawatte Hamine*, 1878, 2 S.C.C. 4; *Silva v. Panditaratene*, 1913, 1 Bal. Notes 78.

2. *Jayasooriya v. Omer Lebbe Marikar*, 1892, 2 C.L.R. 6.

3. Thes. Code III.I.

share in the profits without even considering that their laws and customs clearly adjudge such fruits to the person who has acquired them by his labour and industry. When in such a case (not being able to obtain the fruits) they generally request to divide the ground to know what belongs to each person: such division may not be refused; but care must be taken in making it that the part which has been so planted falls to the share of the brother who planted the same, and that the unplanted part falls to the share of the other joint proprietors, unless they wish to put off the re-partition of the ground and give one another time to plant an equal number of trees and by proper attention to get them to bear fruit, in which case the re-partition must be general without considering who has planted the ground."

It will be seen that two conditions are necessary for a co-owner who plants the common land to be entitled to the fruits of his labour. Firstly, he must plant within an area proportionate to the share in the common land. Secondly, the other share-holders should not have expended any money or labour in planting that area. When both these conditions are satisfied, the planter is entitled to the fruits from the trees planted by him. Under the general law of the land a co-owner is entitled to plant the land with the consent of the co-owners. A joint owner of land is entitled to make a reasonable use of the common property proportionate to his share therein for the purpose for which the land is intended.¹ A co-owner when he plants the land could assert a right to a planter's interest to trees against another co-owner's² and an improving co-owner is entitled to the fruits of the improvements effected by him.³

The other co-owners could force a partition in which event the Thesawalamai Code states that the portion planted should be given over to the planter. This portion of the Thesawalamai is now implicitly repealed by the provisions of the Partition Ordinance.⁴ Under the Partition Ordinance when a partition has been ordered, as far as possible, it is the practice to give the co-owner that portion of the land which has been planted by him. When

1. Vide *Deerasekera v. Badun*, 5 Times 78; *Goonewardene v. Goonawardene*, 17 N.L.R. 143; *Muttaliph v. Mansoor*, 39 N.L.R. 316.

2. *Babunda v. Marikar*, 1 Times 103; *Balahamy v. Juwanies*, 1 Bal. Notes 71; *Wickremaratne v. Don Bastian*, 4 Bal. Notes 41.

3. *Podisingho v. Alwis*, 28 N.L.R. 401.

4. Cap 56

that is done the other co-owner is not required to pay compensation to the other co-owners for these improvements.¹ Where, however, the portion so planted is allotted to another co-owner, the compensation to be paid to the co-owner who has effected the improvements is the present value of the improvements or the cost of effecting the improvements whichever is less.² If a sale is ordered under the Partition Ordinance, any improvement must be valued according to the expenditure in respect of the improvement or less, if the improvement is less in value.³

RIGHTS OF A PERSON OTHER THAN A CO-OWNER PLANTING THE LAND

The rights of a person who plants another's land are stated in the Thesawalamai Regulations as follows:-⁴ "If a person has not a proper piece of ground of his own on which to plant coconut trees and is alleged to do it on another man's ground, he gets two-thirds of the fruits which the trees planted by him produce, provided that he himself furnished the plants, and if the owner of the ground supplies the plants, the planter gets but one-third and the owner of the ground the other two-thirds. If, however, they have both been at an equal expense for the plants, then they are entitled to an equal share of the fruits and trees. This division mostly takes place in the Province of Tenmaratchi, for in other provinces they know better how to employ their grounds than to let strangers plant coconut trees thereon. If a labourer squeezes out his *panankays* (palmyrah fruit) and sows the kernel in order to obtain plants; and on digging them out forgets some of them which afterwards becomes full-grown trees bearing fruits, the fruits which they produce remains the property of the owner of the ground, the trees having grown of themselves without trouble (such as watering them) having been taken."

This custom would appear to have been only observed in the Tenmaratchi District. The planter's interest would vary according to the trouble and labour involved. An exception is made in the case of a servant planting palmyrah seeds.

1. *Modrich v. La Brooy*, 14 N.L.R. 331; *Appuhamy v. Sanchihamy*, 21 N.L.R. 33.
2. *Modrich v. La Brooy*, 14 N.L.R. 331; *Appuhamy v. Sanchihamy*, 21 N.L.R. 33.
3. *Kanapathipillai v. Nagalingam*, 22 N.L.R. 223.
4. *Thes. Code* III 2.

It is respectfully submitted that the parties could enter into an agreement chainging the incidents of law already stated, provided it is notarially executed, the maxim of law being "*Madus et conventio vincunt legem.*"

It was at one time doubted whether, apart from a contract, a planter's rights could be acquired by custom. In *Sinne Wappo v. Mohamedo*,¹ a Full Court answered the question in the affirmative. In a later case the correctness of this decision was doubted and the Courts took the view that after the Frauds and Perjuries Ordinance came into operation, a planter's share can only be acquired by notarial grant or prescription.² But in *Saibo v. Baba*,³ a Divisional Court held that a planter who plants another's land is in the position of a *bona fide* possessor and is entitled to be compensated if he is to be turned out. If he possesses the plantain adversely for a prescriptive period he acquired the planter's right by prescription.

1. 1860-62, Ram. Rep. 113.
2. See *Jayasuriya v. Omer Lebbe Markar*, 1892, 2 C.L.R.6; *Silva v. Cottalawatte Hamine*, 1878, S.C.C. 4; 1887, 7 Tamb. 77.
3. (1917) 19 N.L.R. 441 at 445.

CHAPTER XXII

THE LAW OF OBLIGATION IN GENERAL

Law subserves social needs. In an agricultural and rural society there will be few contracts. The Law of Contracts with its intricacies is the product of the modern age and was developed to meet the requirements of commerce. Hence, when Thesawalamai was codified by Claas Isaaksz there were a few contractual obligations which were governed by the customary Law such as sale, hire and lease, exchange, pawn, etc. The Compiler of the Thesawalamai Code has codified the principles governing these contracts prevalent during an era when the Tamils were chiefly engaged in agricultural pursuits.

With the impact of Roman-Dutch Law, with its developed principles governing the Law of Contracts, and with the constant inroads made by the English Law the primitive rules of Thesawalamai on the subject were disregarded and naturally became obsolete. Although ample power was given to the Commissioner of the Revised Edition of the Legislative Enactments to omit obsolete provisions, these provisions have reappeared in the revised Enactments. It is submitted, however, that by such reproduction they do not acquire a new lease of life. There are several Ordinances which have impliedly repealed the Law of Contracts stated in the Thesawalamai Code. In this work an attempt is made to show the extent to which such repeal has taken place.

The Law of Delicts or Torts is not discussed in the Thesawalamai Code. During the time of the Tamil Kings, wrongs were redressed by punishments awarded either by the Chieftain or the King and hence the Law of Torts as known to the English Law or the Law of Delicts as developed by the Roman and Roman-Dutch writers, had no place in this system.

The evidence found in the Thesawalamai Code and the Mukkuwa Law does not support the views of Sir Henry Maine. Maine says:¹ "Nineth-tenths of the civil part of the Law practised by civilised societies are made up of the Law of Persons, of the Law of Property and of inheritance, and of the Law of Contract. But it is plain that all these provisions of jurisprudence must shrink within narrower boundaries, the nearer we make our approaches to the infancy of social brotherhood." After giving reasons why in a primitive society the Law on the subjects mentioned should remain undeveloped, he says:² "There are no corresponding reasons for the poverty of penal Law, and accordingly, even if it be hazardous to pronounce that the childhood of natives is always a period of ungoverned violence, we shall still be able to understand why the modern relation of Criminal Law to Civil Law should be inverted in ancient cases... Now to penal Law of ancient communities and not the Law of it is the Law of Wrongs."

The Mukkuwa Law entirely dealt with the Law of Inheritance and was a system of Law that has existed from the 2nd century. The Thesawalamai dealt with other civil matters but great emphasis is laid on the Law of Inheritance. In both these systems there is the absence of the Law of Torts. Thus we see Maine's theory is not universally true.

In modern times, Law of Delicts is partly the Roman-Dutch Law, partly the English Law tacitly adopted and partly is statute Law. With these observations the peculiar contracts considered by Thesawalamai may be stated.

1. Maine's Ancient Law with notes by Sir Fedrick Pollock, 1809 Edition, p. 378.

2. Maine, p.379.

CHAPTER XXIII

SALE

The general principles of the Law of Contract are governed by the general Law of the land. The Thesawalamai Code deals with certain kinds of contracts, such as sales, gifts, pawns, loans, hire, exchange. We shall consider these in detail.

SALES

The contract of sale may be in respect of movable property or immovable property. Under the title "pre-emption" we have considered the peculiar incidents of Thesawalamai on that subject. In dealing with the sale of immovable property, which is subject to an otti mortgage, clause VII(1) of the Thesawalamai Code states that it was customary for the new purchaser only to pay the difference between the purchase price and the amount due under the mortgage. Claas Isaaksz says that this manner of dealing creates many disputes, as it occurs very often that such sums of money are not discharged before the expiration of eight, nine, and more years and recommends that the passing of the deeds without the purchase amount being fully discharged should be prohibited or at least that orders be given that the previous mortgage should be cancelled and new mortgage bond should be entered into.¹ It appears that this recommendation of Claas Isaaksz was never given effect to. In view of the provisions of the Registration Ordinance,² and the general Law of mortgages, if a person buys a property which is subject to an otti mortgage the new sale is valid. If the mortgage bond is registered in the correct folio the vendee buys is subject to the mortgage.

1. Thes. Code VII. (I).

2. Cap. 101.

Sale of Movables

The Thesawalamai Code only deals with the sale of certain kinds of movables, namely, cattle and children. It is stated in the Code that the sale of any head of cattle was complete the moment the dry dung or excrement of the animal is given to the purchaser. This incident is characteristic of sales known to archaic systems of law. It is also stated that if a person represented that a bull or buffalo is fit enough to plough lands and later it appears that it is not fit to plough lands then the animal should be given back and the vendor must give back the purchase price. On the contrary, if a person purchases a calf which later does not produce a calf the purchaser is obliged to keep the same as no fraud has been practiced. These provisions are similar to the English Law on the subject. After the Sale of Goods Ordinance¹ came into operation, these provisions have been impliedly repealed. The Sale of Goods Ordinance is based on the English Sales of Goods Act and in the case of a *casus omissus* we are governed by the English Law on the subject.²

Free-born persons were alleged to sell their children into slavery when they were in needy circumstances, but such parents were given the right to redeem the children. Claas Isaaksz says that this is an ancient custom and that in his opinion it is grounded on reason. He is of opinion that if the slaves of the above description could prove that they became slaves in the manner stated they should be given the privilege of redemption, as the sale of free-born natives has been positively prohibited in this country.³ It is curious that this provision of the Thesawalamai, though indigenous in origin, is the same as the rule in Roman Law as laid down by Justinian.⁴ It appears that only the Dutch prohibited the sale of free-born children. These provisions are abolished after slavery has been abolished by Ordinance No 20 of 1844, and consequently has not been reproduced in the later Legislative Enactments.⁵

1. Cap. 70

2. Cap. 66

3. Thes. Code VII. 3.

4. See Bucklands' Text book of Roman Law.

5. Cap. 51.

PAWN, HIRE AND EXCHANGE

Pawn

If any jewels or wrought gold and silver have been pawned and the pawnee uses them for his personal use the Thesawalamai Code states that he forfeits his interest for that period. This is a provision taken from the Hindu Law.¹ Now the Pawnbrokers' Ordinance² applies to all pawn transactions by a pawnbroker. To that extent it has impliedly repealed the provisions of the Thesawalamai Code. The question may arise whether provisions of the Thesawalamai Code apply to pawn transactions not covered by the Pawnbrokers' Ordinance. Hence the statement of Mr. Isaak Tambiah that section V.(8) on pawns is not subject to the Pawnbrokers' Ordinance,³ must be taken subject to this qualification. But it must be said that on the subject of pawn the Roman-Dutch Law applies and most of the provisions of the Code are obsolete.

Hire

Dealing with the hire of beasts. The Thesawalamai Code states⁴ "When any person has hired one or more beasts in order to plough his land, the proprietor of such beast is not obliged to furnish the person who has hired the same with fresh beasts in case such as were hired become sick or happen to die during the time they were used to plough the land. In case any person borrows from another any beasts for his use with the free consent of the proprietor, according to the customs of the country may not demand from the borrower any indemnification for such of the beast as are hurt or have broken their legs, but most consider the loss as accidental and consequently leave the same".

It may be said that there is nothing to prevent the parties leading evidence of contrary custom in order to avoid the provisions of the Thesawalamai Code, which merely stated an existing custom at that time.

1. Colebrooke's Hindu Law, Vol. I., p. 149.

2. Cap. 75.

3. Tambiah's Reports, Vol. II., p. 49.

4. Thes. Code vi.

Exchange

It is stated in the Thesawalamai Code that in case any person wishes to exchange grain, paddy, *chami*, *kurakkan*, *kolli*, *rice* and *cadjan* must be exchanged for an equal quantity, because they bear the same price; but any person wishing to exchange paddy for *varaku* must give one and a half *parai* of *varaki* for one *parai* of paddy.¹ As the price of these articles varies in modern times, the contract of exchange will be governed by the agreement of parties.

1. Thes. Code IX. 6.

CHAPTER XXIV

DONATIONS

In discovering the Law of donations under the Thesawalamai Code we must have in mind the provisions of the Hindu Law governing the joint family. In this branch of the Law of Thesawalamai we find the influence of Hindu Law most pronounced.

The Thesawalamai Code says:¹ "When husband and wife live separately on account of some difference, it is generally seen that the children take the part of the mother and remain with her. In such a case a husband is not at liberty to give any part whatsoever of the wife's dowry away; but if they live peaceably he may give some part of the wife's dowry away. And if the husband on his side wishes to give away any part of his hereditary property which he has brought in marriage, he may then give away one-tenth of it without the consent of the wife and children, and no more; but the wife, being subject to the will of the husband, may not give anything away without the consent of the husband."

These provisions indicate that the joint family system was obtaining in Jaffna. The husband, being regarded as the manager of the joint estate, could not alienate either the dowry property during separation or even the whole of his hereditary property. He could only alienate a tenth of his hereditary property, the rest has to go to his family. These provisions closely resemble the legitimate portion referred to in Roman Law and the provisions of the Lex Falcidia. The wife cannot alienate even her dowry, the husband being regarded

as the manager during coverture. These provisions do not apply to persons governed by the Jaffna Matrimonial Rights and Inheritance Ordinance,¹ which gives the husband full power to dispose of his hereditary property.² The wife could dispose of her property by any act *inter vivos* without the consent of the husband if they are movables, and with his written consent if they are immovables.³ If the spouses are separated and the husband does not give his consent, on an application made by the wife to Court the consent will be given.⁴ By last will a spouse can leave his or her property to any one he or she likes.⁵

Donation to Nephews and Nieces

The Code says: "If a husband and wife have no children, and are therefore desirous to give away some of their goods to their nephews and nieces or others it cannot be done without the consent of the mutual relations. This provision is taken from the Hindu Law.⁶ Since the property is regarded as joint family property the consent of the relations was necessary for alienation. These provisions are now obsolete in view of the provisions of the Jaffna Matrimonial Rights and Inheritance Ordinance and the Wills Ordinance,⁷ referred to earlier."

Gift to one of the Spouses

The Code says: "If a husband or his wife receives a present or gift or a garden from another person, so much of such gift or present as is in existence on the death of one of them, when the property is divided, remains to the side of the husband or wife to whom the present was made, without any compensation being claimable for any part of the gift that may have been alienated; but the proceeds thereof acquired during marriage must be added to the acquired property. But if any one has a present of a slave, cow, sheep, or anything else that may be increased by procreation, such present, together with what has been procreated, remains to the side where it was given, with-

1. Thes. Code IV. 1.

1. Cap. 48.
2. See section 7 of Matrimonial Rights and Inheritance Ordinance Cap. 48.
3. Section 6 Cap. 48.
4. Section 8. Cap. 48.
5. See section 2 of the Wills Ordinance, Cap. 49.
6. Colebrooke's Hindu Law Vol III, p. 246.
7. Cap. 48 and Cap. 49.

out any compensation being claimable for what might have been sold or alienated thereof."¹

These provisions make it clear that gifts were regarded as the separate property of the spouse to whom the gift was made, but any produce or proceeds obtained from the subject-matter of the gift was regarded as the acquired property of both spouses.

Under the Matrimonial Rights and Inheritance Ordinance (Jaffna) the distinction is drawn between "father's side property" and "mother's side property" in the law of intestate succession". Property received in donation or in any other manner than for pecuniary consideration from a mother or any of her ascendants or any of her collateral relations is said to be property derived from the mother.² If the property is derived from the father, his ascendants or his collateral, it is called 'father's side property.'

GIFTS TO CHILDREN

A father could give his hereditary property to one of his sons. If his only other son died thereafter and the son to whom he made the donation also died, the father's hereditary property and half of the acquired property after payment of debts devolve on the father's brothers and the mother's property and half of the acquired property after the debts are paid go to the mother's sisters.³ In other words, the inheritance devolves as if no gift had been made. The same rules apply as if the mother effected the gift.

But if the gift has been obtained from any other person, then it is divided equally between the father's side and the mother's side. It would also appear that the son can only demand the property gifted to him after the death of the parents.⁴ But under the present law he could exercise proprietary rights immediately. Presents and gifts made by relations to the sons remain the separate property of the sons.⁵ Such property under the Hindu Law was regarded as the separate property of the children.⁶ Whatever is acquired by

the son himself without detriment to the father's estate as a present from a friend or a gift at nuptials does not appertain to the co-heirs. Under the Matrimonial Rights and Inheritance Ordinance (Jaffna) if the gift is made by the relatives on the father's side, then the property so gifted is regarded as 'father's side property' if given by the relations of the mother it is regarded as 'mother's side property.'¹

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1. See the Matrimonial Rights and Inheritance Ordinance, Jaffna p.25, Vol .II. Revised Leg. Enact.

1 Thes. Code IV. 3.

2. Section 18, Cap. 48.

3. Thes. Code IV. 4.

4. Thes. Code IV.4.

5. Thes. Code IV.5.

6. Maine 365, Manj, IX., p.206, Narada XIII, p. 6 - 7.

CHAPTER XXV

LOANS OF MONEY

The Thesawalamai Code:¹ provides as follows:- "When any person lends a sum of money upon interest to another upon condition that the borrowed sum should be restored within the term fixed by the lender, with such interest as was usually paid to others at the time that the money was lent by him, should such conditions not be fulfilled by the debtor, the creditor in that case must cause the pawn to be sold, if he has had the prudence to take any lands or any other goods whatever in pawn; and in case the debtor does not consent to the said pawns being sold, the lender of such sums of money must prefer his complaint to Government and request from the same that such mortgaged goods be sold for his benefit."

These provisions were regarded as obsolete but they have been re-produced in the new Legislative Enactments.

Under the present law, if the property pawned to a pawn broker is a movable article, it can only be sold in pursuance of the provisions of the Pawn-brokers' Ordinance. In pawn transactions which are not governed by the Pawnbrokers' Ordinance,² in the absence of agreement, the pawnee must obtain a decree of Court to sell the pawned article. If the property mortgaged is an immovable the mortgagee must bring a hypothecary action and under the decree must sell up the property. Hence, the provisions of the Thesawalamai Code which states that "a lender of such sums of money must prefer his complaint to Government and that through its channels the mortgaged goods be sold for his benefit" are obsolete. The proper channel now is to obtain redress through the Courts.

1. Thes. Code IX. 1.

2. Cap. 75 repealed by 13 of 1942.

Interest not to exceed Capital

Under the Law of Thesawalamai, when a person lends money on interest and allows the interest to exceed the principal, the debtor is not obliged to pay the interest exceeding the principal.¹ The provision appears to be taken from the Roman-Dutch Law,² and is in accordance with the general law of the land.³

SURETYSHIP

The Law of Suretyship, as stated in the Thesawalamai Code,⁴ is taken mainly from the Hindu Law.⁵ Section IX (2) of the Code reads as follows:- "Should there be securities and should the debtor or borrower abscond or be in reduced circumstances and unable to discharge the debt contracted by him, the creditor may then demand the payment of such debt from the securities, who in such case are obliged to discharge the debts for which they became securities, and such securities reserve the right of instituting an action against the debtor should the latter be improved in circumstances. If two persons jointly borrow a sum of money from another and bind themselves, generally for the amount borrowed, the lender in that case may demand the payment of the amount borrowed, the lender in that case may demand the payment of the amount so lent from such a debtor as he may happen to see first, provided that the following expressions are inserted in the *alai*, or bond, viz., Manninren, *Munirukka*.... which signifies: "He who is present or before me must pay the debt"; the consequence whereof then is that the debtor who comes first before the creditor, when he intends to demand the money, must pay the whole debt; but such a debtor who pays the whole debt has a right to demand the payment of half the amount paid by him from his fellow-debtor wherever he may find him."

The Editor of the early Legislative Enactments commenting on this section says that this only applies to joint and several bonds.

It may be said that these provisions are obsolete now. The Law governing suretyship throughout Ceylon is the Roman-Dutch Law.

1. Thes. Code IC.4 See also M.676, Case No. 275.

2. See Vander Linden, p. 219.

3. See p. 5 Civil Law Ordinance, Cap. 66.

4. Thes. Code I C. 2

5. See Colebrooke's Hindu Law, Vol.1, p. 110.

There is one more topic that must be considered in this connection. Before the Married Women's Property Ordinance came into operation women in Ceylon enjoyed the privileges conferred on them by the Roman-Dutch Law, namely, the *Senatus Consultum Velleianum* and the benefit of the *Authentica si qua mutier*. This Ordinance abolished these benefits,¹ but it is stated that the Ordinance has no application to Tamils of the Northern Province who are or may become subject to Thesawalamai.² Hence, it follows that these provisions of the Roman-Dutch law still apply to Tamils governed by the Thesawalamai.

By the *Senatus Consultum Velleimum* and *Authentica si qua mutier*, women were prohibited from binding themselves as sureties and, in particular, married women are prohibited from binding themselves as sureties for loans of money to their husbands.³ If the married women, who are entitled to these benefits, wished to renounce these benefits they should expressly renounce them. Hence, a general renunciation of the benefits conferred on sureties will not be sufficient.⁴

1. See section 29 of Cap. 46.

2. 3, sub-section 2 of Cap. 46.

3. Lee on Roman-Dutch Law, p. 317.

4. *Goonetilleke v. Abeyagoonesekera*, 1914, 17 N.L.R. 368.

CHAPTER XXVI

THE FUTURE OF THESAWALAMAI

Recently there was a motion before Parliament which was based on the wrong assumption that the Thesawalamai applies to Tamils who regard the Northern and Eastern province as their homelands. None of the decisions of our courts is based on this assumption. In deciding upon the applicability of Thesawalamai our courts have proceeded on the basis of inhabitancy. Any Tamil having permanent residence or inhabitancy in the Northern Province, at the time when the issue is raised, has been held to be governed by Thesawalamai. Thesawalamai does not apply to Jaffna Tamils who are settled outside the Northern Province if they no longer have a Jaffna inhabitancy. This was decided in a number of cases. This principle is clearly illustrated by *Velupillai v. Sivakamipillai*¹ and *Somasundaram Pillai v. Charavanamuttu*² among other cases. In the latter case it was held that Mr. V. Charavanamuttu, a Jaffna Tamil married to another Jaffna Tamil in Jaffna was not governed by Thesawalamai since his residence was Colombo. In *Chetty v. Chetty*,³ it was held that Vaniva Chetty from India who had his permanent residence in Jaffna was governed by Thesawalamai. In *Nagaratnam v. Suppiah*,⁴ H.N.G. Fernando J. held that an Indian Tamil who was not a citizen of Sri Lanka but who had permanent residence in Jaffna was governed by Thesawalamai.

It may be noted that quite a number of Jaffna Tamils who are residing outside the Northern Province are not governed by Thesawalamai, although their parents might have been governed by Thesawalamai. In a recent case the Supreme Court held that the burden is on a person to prove that he is governed by Thesawalamai and there

1. (1910) 13 NLR 74

2. (1942) 44 NLR

3. (1935) 37 NLR 253

is no presumption that any Tamil is governed by Thesawalamai.¹ This decision disposes of the wrong theory that the personal part of Thesawalamai is based on the homeland theory propounded by politicians.

Repeal of Thesawalamai unnecessary and discrimination

If Thesawalamai is to be repealed, then Kandyan Law also must be repealed for persons who themselves have their permanent home in the Kandyan provinces. The Kandyan Law Declaration Amendment Act,² Kandyan marriage and divorce Act No. 44 of 1952 etc., proceed on the footing that Kandyan Law only applies to Kandyans whose homeland were in the Kandyan districts at the time of annexation by the British. In any event, our Courts did not proceed on the homeland theory but more on the ethnic concept. Binna and Deega marriages could not be registered except among Kandyans, and if a Registrar does so with the knowledge that they are not Kandyans, he was penalised.

Under our constitution all persons have equal rights under the law and it will be discriminatory legislation to repeal the Thesawalamai for no reason and allow Kandyan Law and Muslim Law to remain.

The Matrimonial Rights and Inheritance Ordinance, which was later repealed, prohibited all married women from transferring their immovable property, except with the written consent of their husbands. This Ordinance was repealed by the Married Women's Properties Ordinance which took away this restriction. But the provisions of the Jaffna Matrimonial Rights and Inheritance Ordinance remained. Hence the Jaffna married woman governed by Thesawalamai (Vol. III cap. 58) cannot transfer any immovable property, whether ancestral or acquired, except with the written consent of her husband. She is also treated as a minor for purposes of entering into contracts and for appearance in courts. In view of the recent decision of the Supreme Court³ on what is meant by acquired property, certain amendments will have to be made to the Jaffna Matrimonial Rights (Amendment) Ordinance of 1947, and therefore these matters could be referred by Parliament to a commission – preferably the Law Commission – to report and draft the law to rectify these matters.

1. *Sivagnanalingam v. Suntheralingam*, [1988] 1 Sri L. R. 86.

2. *Legislative Enactments Vol. III* (Cap. 59)

3. *Manikkavasagar v. Kandasamy* [1986] 2 Sri L.R. 8

Law of Pre-emption benefits Non Tamils

There is nothing in this law which prevents a non-Tamil from buying any property in the Northern Province. What is prohibited is that a co-owner cannot sell his co-owned share to a stranger, except to other co-owners or co-sharers. Our Courts have interpreted the co-sharers to mean those who had been intestate heirs at the time of the sale. Notarial notice has to be given to the co-owners and co-sharers before a person could sell his share and if they refuse to buy it nothing prevents a co-owner from selling it to an outsider. Indeed this will be a protection to non-Tamils to buy property in the Northern Province, because if he dies his heirs would be his wife and children. Therefore he cannot sell his share to others without giving notice to his wife and children to buy that particular share. As erroneous view has been taken by some, who do not know the applicable law, to state that a non-Tamil cannot buy any immovable property in the Northern Province. There is not a single provision in the Pre-emption Ordinance which supports this view.

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APPENDIX I

HINDU LAW OF TEMPORALITIES

In the previous chapters we dealt with the customary laws of the Tamils of the Northern Province known as Thesawalamai. In this chapter an attempt is made to develop another branch of Law peculiar to the Tamils who profess the Hindu religion in Ceylon, dealing with the administration of Hindu temples. This branch of Law is often called the Law governing Hindu temporalities. It is not peculiar to the Tamils of the Northern Province who profess the Hindu religion but is applicable to all Hindus who worship in Hindu temples situated in Ceylon. This aspect of the Law must be considered in this thesis since this system of law is founded upon custom and forms part of the customary Laws of the Tamils of North Ceylon.

ORIGIN AND HISTORY

Dealing with the origin and history of the Hindu Law temporalities Perera, J., said in the of *Sivapragasan V. Swaminathan Iyer*:¹ "I do not think I am wrong in assuming that a Hindu temple is purely an Indian institution; but while such institutions have been established in Ceylon by those professing the religion to which the institution belong, the Laws and recognised usages prevalent in India governing the proprietorship and management of these temples and their temporalities have not been imported into this country." In a later case in *Murugesu v. Aruliah*,² he modified his views and expressed the true view regarding the origin of this branch of law. He said: "It has been said that the customary Law of the Hindus of India with reference to temples has been imported into this country. I am not aware of any legal process by which the Law, customary or otherwise, of one country is imported into another, except, of course, express legislation. The customary Law of one country may be observed by a class or community in another country so long as to let it develop into a custom having the force of law in the latter country." As Perera, J., remarked in this case the Hindu Law of temporalities in Ceylon is mainly founded on custom. The Hindus of Ceylon are descended from the Hindus of South India and have always had close connection with the shrines in South India. It is, therefore, not surprising that these customary usages are similar. Indian decisions, particularly the decisions of the Privy Council will be helpful on the subject. Grenier, J., in dealing with the origin of this branch of law said: "There is the Hindu customary Law which is capable of proof in the way in which customs and usages to other matters can be proved. Whether these customs and usages have been imported from India or have grown up amongst the Hindus of this country, and possess the sanctity of ages, their existence cannot be overlooked: they are potent factors which have governed and still govern the ownership, devolution, and management of Hindu Temples and the administration of their temporalities."³

The history of Hindu Endowments in India is also discussed by Pundit Saraswathy. He says:⁴ "The present system of Hindu Endowments is the evolutionary product of the religious history of the people from the most ancient times. Its roots can be traced back even to the Vedas. A writer on any branch of the Hindu Law is bound to investigate the Vedas for any indications, however embryonic, of the subject-matter under consideration" After dealing with various texts of the Vedas he says that the Vedas distinguished between

1. 1905, 2 Bal. Rep. 49 at p. 53.

2. 17 N.L.R. 91 at p. 92.

3. *Ramanathan V. Kurrukul*, 1911, 15 N.L.R. 216 at 218.

4. Tagore Lectures, 1892, by Pundit Prannath Saraswathy, published by Thackar and Spink, Hindu Law of Endowments. p. 8.

Purta and Ishta. The learned writer says:¹ "The following enumeration of *Purta works* can be compiled from the texts above quoted or referred to:-

- (1) Gifts offered outside the sacrificial ground;
- (2) Gifts on the occasion of an eclipse, solstice and other special occasions;
- (3) The construction of works for the storage of water, as wells and tanks;
- (4) The construction of temples for the gods;
- (5) The establishment of processions for the honour of the gods.
- (6) The gift of food;
- (7) The relief of the sick."

During the Vedic period, temples were erected for the worship of the particular deities and lands were annexed to them for the perpetuation of their worship generally by Brahmins.² But these temples were purely domestic in character. There is no mention of any temple or any reference to a public place of worship and worship was purely domestic during the Vedic period.³

The origin of modern temple worship is to be attributed to Buddhist influence, Ghose says:⁴ "It is to Buddha that India owes the introduction of fixed places of worship and of ordained orders of preachers. In Buddhism there are three essentials (a) Adoration of Buddha, (b) Observance of his Laws, and (c) Congregation. Buddha instituted the order of monks and nuns with a view to religious instructions being imparted to the uninitiated. Places of shelter or refuge were founded in order that the world-weary may retire to them and receive religious consolation. From these simple beginnings a disciplined army of Bikkhus came into existence . . . The followers of Buddha pursued a policy which was resented by the orthodox. Temples for the worship of Siva and Vishnu were established at or about this time to circumvent the Buddhistic influence.

The second period begins with the advent of Sankara. He found that the ancient worship of the elements was losing hold of the popular mind. . . He founded mutts which took the place of monasteries. He founded various orders of Sannyasins who were enjoined to impart religious instructions. He undoubtedly succeeded in driving Buddhism from the Land and laid the foundation for institutions which cannot be said to have fully served the purpose which he had in mind. The successors of Sankara did not find it easy to console the religiously-inclined by the doctrines of Advaita philosophy Sankara was described as the pseudo-Buddha. The common people hankered after something more real than is to be had in the swerverly logical philosophy of Sankara. Three philosophers who gave prominence to the existence of a personal God diverted public attention from Sankara's teachings. The Vaishnavites, the Madhivas and the Saivites founded independent mutts where the Dvaitic philosophy was taught. They had to proceed a step further. They accepted control over existing temples and encouraged the construction of new temples in honour of the particular deity they represented as the Supreme Being.

"By this time, the Puranas had gained a hold on the popular mind, and the worship of the avatars of Vishnu and of the manifestations of Siva came to be regarded as the essential feature of religious life among the people. Rich endowments were made for the upkeep of the temples. But the priests capable of rendering services in these temples had to be found. It has always been the belief in India that the nearer a man is to God, the farther is he from them.

The archakas having been looked down upon in the manner as evident from the slokas referred to below, naturally great inducements had to be offered by liberal grants of land and by promise of perquisites. This is how the archaka (priestly) office came to be founded."

Thus public temple worship and the foundation of the priestly class came into existence with a view to driving Buddhism from India. From the time religious institutions were recognized, a body of customary Law grew up to regulate the affairs of these institutions. In modern times these usages have been recognised by the decisions of the Indian Courts and in particular by the decisions of the Privy Council. The basic customary rules governing the Hindu Law of Endowments are the same in India and Ceylon.

Although there are similarities between the Indian Law and the Law of Ceylon on the subject, there are some important differences in the customary usages of the two countries. Thus, in India, a female is not disqualified by reason of her sex from being a manager.¹ But in Ceylon it has been held that a female cannot be appointed as a manager.² In India, in the case of a public religious trust, it is the right of any worshiper and devotee of a temple to enter the shrine for purposes of worship. He cannot be refused admission without just cause. In Ceylon our Courts have held that according to the rules and tenets of the Hindu religion and the customary usages of the people, persons belonging to the barber caste have no right to enter certain Hindu temples.³ Under our law in the administration of Hindu religious trusts the provisions of the Trust Ordinance would apply.

SUBJECTS GOVERNED BY HINDU ECCLESIASTICAL LAW

Our Courts do not profess to exercise jurisdiction in purely ecclesiastical matters unless in the rules which any religious community has made for its members in relation to any religious object there is some civil right involved. If the matters involved affect the right of property or the fabric of the temple then our Courts will assume jurisdiction.⁴ Hence, usually, the subjects governed by this branch of the law will be the devolution of the trusteeship, the hereditary rights of priests and the rights of temple servants for enjoying certain perquisites and emoluments, etc.

It is not necessary that in every case some right to property should necessarily be involved to vest our Courts with jurisdiction. In *Nesamma v. Sinnatamby*,⁵ it was held that the right of a person to worship at a Hindu temple is a civil right enforceable in a Court of Law.

DEVOLUTION OF TRUSTEESHIP

In considering the devolution of trusteeship of a Hindu temple and its temporalities the fundamental rule is that, if there is an instrument of trust by the founder providing for the devolution of trusteeship, the devolution will take place in pursuance of the terms and conditions contained in the instrument of trust.

In the absence of such a deed or other statutory provision, the Court will have regard to the custom and usage of the temple in question. In *Ramalingampillai v. Vythingam Pillai*,⁶ or a question of the right of succession to the office of *dharmakarta* (trustee) of a

1. Tagore, Lectures, p. 27.
2. Tagore, Lectures, p. 29.
3. Tagore, Lectures, p. 34.
4. Laws of Endowments Hindu and Mohammedan, by A. Ghose, 1st edition, p.4.

1. Gour's Hindu Code, Section -14, p. 920.
2. *Ponnambalam V. Rotusvariamma*. (1933) 2 C.L.W. 203.
3. *Kurrukal V. Ruranny*, 1910, 2 Curr. L.R. 182.
4. *Kurrukal V. Kurrukal*, I.S.C.R. 354 at p. 356.
5. 36 N.L.R. 75.
6. L.R. 16 Madras 490, 20 I.A. 150.

devastanam or temple at Rameswaram in Madras was discussed, Sir Richard Couch, said:¹ "It has been laid down by this Committee that the only law applicable to such an appointment as this professes to be, is to be found in custom and practice, which are to be proved by testimony."

Both Courts found in this case that according to the established usage of the religious foundation, each dharmakarta initiated a Vellala layman and made him an ascetic and thereupon appointed him as a successor. The Privy Council did not interfere with those findings of fact. There are several other cases where this principle has been stated by the Privy Council and the Indian Courts.²

It must be noted, however, that it is the custom and usage of the *temple in question* that must be considered and not the general custom of the locality. This principle has received Legislative sanction in Ceylon. Section 106 of the Trust Ordinance says: "that in settling any scheme for the management of any trust under S. 102 of the Trust Ordinance or in determining any question relating to (a) the constitution or existence of any such trust, (b) the devolution of the trusteeship, and (c) the administration of the trust, the Court should have regard to (1) the instrument of the trust: (2) the religious Law and custom of the community concerned; (3) the local custom and practice with reference to the particular trust concerned." Custom may prescribe religious usage by which a trusteeship should devolve. Thus Grenier, J., said:³ "It is well-known fact that Hindu temples in Ceylon are under the control and management of persons in whom the fabric is vested (1) by right of private ownership, (2) by grant or assignment by the owners of the land on which the temple is built, (3) by appointment by the congregation, (4) by deed of trust, a term well understood among Hindus. I have not exhausted all the means by which managers or trustees are appointed." We shall endeavour to show the various modes by which a person may become a trustee of a public Hindu temple and its temporalities in greater detail. We shall consider the devolution of trusteeship of a public charitable trust.

By deed of Trust

By a duly constituted deed of trust, the founder of a temple can dedicate it to the public and prescribe for the devolution of trusteeship. Religious endowments are of two kinds. In a public endowment, the dedication is for the use or benefit of the public. But, when property is set apart for the worship of a family deity, in which the public are not interested, the endowment is a private one.⁴ In India, the family idols are not chattels or the property of the family. They are legal entities having, within limits, independent rights.⁵ But in Ceylon, our Courts have refused to recognise the juristic personality of idols.⁶ Hence, in the case of a private temple, the temple and deities will be the private property of the owner or his heirs or devisees. To constitute a public charitable trust there must be dedication. Whether in a particular case there is a valid dedication, is a question of fact to be determined by a reference to the terms of the document of dedication where there is one.⁷ Where there is no document or the terms thereof are ambiguous⁸ the usages and traditions may be considered.⁹ The fact that members of the public are invited and freely invited to

the temple is *prima facie* proof of dedication.¹ If the Hindu public have used this temple freely for centuries, there is strong evidence of its being public one.² The presumption is in favour of public dedication.³ Thus in *Kurrukal V. Kurrukal*⁴ the evidence disclosed that a Saivite reformer founded the temple with the assistance of several leading Saivites. In 1896 the temple was dedicated for religious worship with the usual ceremonies. It was contended that this temple was the private property of the heirs of the founder. In rejecting the contention Bertram, C.J., said: at page 36, "I am totally at a loss to understand the contention that the temple may be considered as something in the nature of what Mayne refers to as 'a private chapel in a gentleman's park'⁵ to which the public have access but which at any time may be closed at the will of the proprietor. Nor can I understand the view of the learned District Judge that this temple is something between such a private chapel and an ordinary temple. It seems to me to disclose a public religious foundation of the most ordinary description."

Devolution of Trusteeship by Intestate Succession

As stated earlier, in the absence of an instrument of trust providing for the devolution of trusteeship or any special customary rule pertaining to the temple in question, trusteeship devolves on the heirs of the founder. In the case of *Kumaraswamy Kurrukal V. Kartigesu Kurrukal*,⁶ Bertram, C.J., said: "What then is the religious Law with regard to the management of foundation of this kind. It is perfectly clear that subject to any arrangement made by the founder, the right of the management of the foundation vests in the founder himself and his heirs but the founder himself is entitled to make express provision for its future management." In a later case,⁷ Bertram, C.J., after citing Gour's Hindu Code says: "The religious Law and custom of the community concerned to which we are entitled to have regard under section 106 of the Trusts Ordinance, appears to be that the right of management vests in the founder and his heirs. This is the view that has been consistently followed by our Courts.⁸ This rule must be taken subject to limitations. One can conceive of a case where a person founded a Hindu temple and has numerous descendants. Some of his descendants might have embraced other faiths or might have abandoned all interests in the temple. Hence, could it be said with any sense of reality, that all these remote descendants of the original founder are trustees of the temple. In answering this question the custom and usage observed must be taken into account. It will often be found that only members of a particular family of the founder have been exercising the rights of trusteeship. Only such members are regarded as hereditary trustees of the temple. In *Ambalavanar V. Subramanial Kathiravelu*,⁹ Bertram, C. J., said: "In all such foundations the custom or course of action observed in the family must be taken into account, and in this case that custom or course of action appears to have been that the lands held by the two several branches should be vested in some member of that branch as the representative of himself and the others."

1. In I.L.R. Mad. Vol. 16 at 497 p.

2. See *Gaj Raj Puri V. Achaihar Puri*, I.L.R. 16 All. p. 191; *Basdeo V. Das*, I.L.R. 13 All. 256.

3. *Ramanathan V. Kurrukal*, 15 N.L.R. 216 at p. 218.

4. See Mayne, 10th edition, p. 915.

5. Mayne, p. 915.

6. *Kurrukal V. Kartigesu*, (1923), 2 Times L.R. 120, at 122.

7. 1890, 13 Mad. 66, 73; 18 Mad. 20, 203.

8. 1918, A.I.R. Oudh. 207, 208.

9. 1917, Oudh, A.I.R. 375, 378.

1. *Suraviya Goundan V. Poonachi Goundan*, 1921 A.I.R. Jour. 14. 30.

2. *Kelu V. Sivarama Pattar*, 1928, A.I.R. Mad. 879, 884.

3. 1934, A.I.R. Nag. 48, 49, 50. (1. Chitaley 803, 4th ed.)

4. 26 N.L.R. 33.

5. Mayne's Hindu Law & Custom, 5th ed., 598.

6. 26 N.L.R. 33 at pp. 37, 38.

7. *Kartigesu Ambalavanar V. Subramanial Kathiravelu*, 27 N.L.R. 15 at 22.

8. See *Kurrukal V. Kurrukal* 12 N.L.R. 40. and in India see *Ramanathan Chetty V. Murugappa Chetty*, 33 I.A. 139; 29 Mad. 283 P.C.

9. 27 N.L.R. 15 at 22.

There must, however, be a precise and uniform course of descent in order that a claim to heredity office may succeed. The devolution of office for generations from son to grandson is *prima facie* evidence that the office devolves by succession according to the ordinary law of inheritance. So also where members of particular family held office of *Dharmakarta* or trusteeship continuously for more than a century and there was assertion by them that it was hereditary property, there is good evidence that the office is hereditary in such family.¹ Where two persons belonging to two branches of a family are in joint management for a number of years the presumption is that they have a joint right of management.² Thus, it is clear that all the descendants of the original founder do not become hereditary trustees of the Hindu temple. The evidence will disclose in which family or families the trusteeship devolved.

Under the law of Thesawalamai, the male heirs succeed to the exclusion of married female heirs. Hence, where the manager and trustee of a temple has sons and married daughters, only the sons would succeed to the trusteeship. But supposing he only left female heirs or appointed a daughter as a trustee by a deed, can she function as a trustee? In *Ponnampalam V. Ratuswariamma*,³ our Court had to consider this question. It was proved that in the history of this temple in question it was never the custom of a woman to officiate as trustee. Driberg, J., in answering this question,⁴ said: "The only objection to the action is regarding the prayer that a scheme of management be provided for the temple and that the right of succession of female heirs to its management be excluded. The respondents say that such a right has not been recognised in the history of this trust, as co-managers, which they claim to be with those who rightly succeed Kanapathipillai, they ask that the right of succession be decided by the Court and that a scheme of management be laid down. Considering the relations which now exist between these two families it appears very necessary that this should be done to ensure the proper working of the trust. It must be remembered that it is suggested that in the case of this trust, trusteeship does not necessarily carry with it rights of management of the temple. This one of the purposes for which the proviso to section 101 has been enacted and the respondents are entitled to maintain this action for that purpose. Regarding the respondents' claim that women should be excluded from the management, section 106 of the Ordinance provides that the Court should have regard to local custom or practice with reference to the particular trust concerned."

It will be helpful to consider the Indian authorities on this question. In *Sunderambal Ammal V. Yogavanagurukkal*,⁵ Sadasiva Ayyar, J., said: "As regards the archaka office in a Saivite temple, it is settled custom that females by reason of their sex are permanently disqualified from performing the duties of the office of archaka. It is no doubt an interesting question whether their disqualification by custom is really in accordance with the ancient shastras..... The question is now well settled against the right of the fair sex on the strength of the mediaeval legal authorities Taking it then that a woman is disqualified by her sex from doing the duties of a religious office, can it be said that she can still be the owner of that office by inheritance, overcoming the disqualification to perform the duties of the office by the expedient of having them performed through a male proxy. I am clearly of opinion that on principle a personally disqualified heir who is permanently disqualified to do the duties of an office, cannot inherit the office while at the same time delegating the

duties to others." In *Annaya Tantric V. Ammaka Hangsu*,¹ Wallis, C.J., dissented from the view. He said²: "It is well settled that the succession to temple office is governed by user which is taken to represent the intentions of the founder and the user in the case of temple Archakas is that the office is hereditary and descends in the ordinary course of succession to women who are not themselves competent to perform the duties of the office of ministering in the temple and perform them by deputy." The latter view has been followed in a number of cases and in the absence of custom to the contrary the trusteeship of a public charity, when hereditary in the family of the founder, develops on his heirs like ordinary property and female heirs are not excluded from management.

In *Radha Mohun Mundul V. Dossee*³ their Lordships of the Privy Council endorsed the view expressed by the lower Court which ran as follows: "I do not see any reason why the widow of the family should be incapacitated from superintending the service of the gods. It is not urged by the defendant that any such rule has been laid down in the family, and that under it the widows have been excluded from the above superintendence. On the other hand, among the Hindus persons belonging to no other caste except that of Brahmans can perform the service of a God with his own hands, that is worship the idol by touching its person. Men of other castes simply superintend the service of the gods and goddesses established by themselves while they cause their actual worship to be performed by Brahmans. Thus, when persons of the above description can conduct the service of the widows of their family be able to carry on worship in similar way?"

Hence, the settled view in India is that a woman can be trustee of a Hindu Temple except in two cases. These exceptions were discussed by Seshagiri Ayyar, J., in the case of *Muranavaru Begam Sahili V. Mir Mahapalli Sahib*.⁴ He said "except in the case of grants given for the express purpose of performing religious duties which are dependent on personal or sex capacity I fail to see why a female, whether a Hindu or Mohammedan, should be disentitled to perform those duties." the Privy Council observed in *Shahoo Banoo V. Aga Mohamed Jaffer Bindameen*⁵ that under Mohammedan Law a woman holding the office of a religious trust, which by its nature involves no spiritual duties such as a woman could not properly discharge in person or by deputy, is competent to hold such office. The other exception is where the peculiar doctrines of a sect precludes women married into a different sect from performing the duties of the temple or religious institution belonging to the former sect.⁶ Thus, it is clear that in India, subject to these two exceptions, a woman can function as trustee. In Ceylon too, we have cases where a woman has functioned as the manager of a Hindu Temple.⁷ Hence, it is submitted that unless there is customary usage to the contrary, on principle and authority, a woman is not precluded from being the trustee of a Hindu Temple.

The right of hereditary succession may come to an end in certain ways. In an action under section 102 of the Trust Ordinance, if a hereditary trustee is found to be guilty of breach of trust and other trustees are appointed the hereditary right is lost. Because, a decree under section 102 of the Trust Ordinance is a decree *in rem* binding on the worshipers of the temple, including the heirs of the last trustee who has been removed. In an action

1. See *Ramados V. Hanumanth Rao*, 36 Mad. 364 at 367.

2. *Nilakanda V. Padmabha*, 14 Mad. 153, 162, and *Maina V. Brij Mohan*, 12 All. 287, 594.

3. 2 C.L.W. 202, at 205.

4. See 2 C.L.W. 202, at 205.

5. 38 Mad. 850, 855; 1915 A.I.R. Mad 561 at 564, 565.

1. 41 I.L.R. Madras 886 F.B., 47 I.C. 341.

2. See *Meenakshi Achi V. Somasunderam Pillai*, 4 Mad. 205; see also *Mahamayar Dabi V. Haridas Haldar*, 42 Cal. 455, 475.

3. 23 W.R. 369 P.C.

4. 41 Mad. 1033, 1041, A.I.R. Mad. 202.

5. 34 Cal. 118 P.C.

6. See *Mohan Lalgi V. Math Sudan Lala*, 32 All. 461.

7. See *Parawathy Amma Case*. 15 N.L.R.I.

under section 102 of the Trust Ordinance the hereditary trustee may intervene, and, if his rights are established, the Court may appoint him along with other trustees.¹ In such an action if a hereditary trustee does not intervene and claim his rights he loses them.

Though the office of a hereditary trustee is firmly established under our law and the Indian law, the observation of Sadasiva Ayyar in *Phalmatic V. Haji Musa Shah*² must be noted. He said "a claim to succeed by hereditary right to a trustee's office or to a religious office or to any other office should be looked upon with strong disfavour by Court whether the office was created by a Hindu or Mussalman or an adherent of any other creed. The holding of any office should depend on the necessary qualifications. Though heredity might raise a feeble presumption of fitness to be considered by Courts in arriving at a decision on the question of successorship to the office, it should not be raised to the dignity of a principle which creates a right of succession to any office, unless the terms of the original foundation of the office constrain the Courts to treat heredity as the factor to be considered in deciding on the right to the office or unless there has been such a precise and uniform course of descent by heredity almost irrespective of any other consideration as to raise an irresistible inference as to the intentions of the original creator of the office."

Appointment by Election

Though, the ordinary rule is one of hereditary succession of a trustee, in the absence of any provision contained in the instrument by trust, there may be special custom or usage prescribing some other modes of succession. Such usage must be ancient and long-established. In *Ramalakshmi Ammal V. Sivanatha Perumal*³ their Lordships of the Privy Council said "Their Lordships are fully aware of the importance and justice of giving effect to long-established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Court can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

The usual customary method by which a trustee is appointed is by election. In order that this may be valid and effectual the election must be by a majority of qualified persons assembled for that purpose. A separate election by a faction of the qualified persons is not a valid and effectual one.⁴

Under our law it is necessary to observe the provisions of section 113 of the Trust Ordinance for the election to be valid. Section 113 (2) states as follows: "Where, Whether before or after the commencement of this Ordinance, in the case of any charitable trust or in the case of any trust for the purpose of any public or private association (not being an association for the purpose of gain) a method for the appointment of new trustees is prescribed in the instrument of trust (other than nomination in the manner referred to in paragraph (a) of section 75), or by any rule in force, or in the absence of any prescribed method is established by custom, then upon any new trustee being appointed in accordance with such prescribed or customary method, and upon the execution of the memorandum referred to in the next succeeding sub-section, the trust property shall become vested without any conveyance, vesting order or other assurance in such new trustee and the old continuing trustees jointly, or if there are no old continuing trustees in such new trustee wholly."

Section 113 (3) enacts that every appointment under the last preceding section shall be made to appear by a memorandum under the hand of the person presiding at the meeting or other proceedings at which the appointment was made and attested by two other persons present at the said meeting or proceeding. Every such memorandum shall be notarially executed. Section 113 (4) enjoins the registrar to keep a special register in such matters.

Section 113 (2) of the Trust Ordinance speaks about a trustee being appointed in the following ways in the case of any trust for the purpose of any public or private association:-

- (1) By a method for the appointment of new trustees prescribed in the instrument of trust (other than nomination under section 75 (a) of the Trust Ordinance).
- (2) By a method for the appointment of new trustees prescribed by any rule in force.
- (3) In the absence of the above by a method established by custom.

The first mode of appointment requires no explanation. The second refers to some rule in force binding on the worshiper of the temple. Thus, in an action under section 102 of the Trust Ordinance if the Court draws up a scheme of management in which a rule is laid down governing the rule of succession of a trustee and when a new trustee is so appointed the provisions of section 113 of the Trust ordinance must be conformed to.

The third method merits consideration. The usual customary method of appointment is by election by the congregation of worshipers of a temple at a duly convened meeting. In such cases the president must sign the memorandum and it must be notarially executed. There are other modes of election contemplated by this section.

Appointment of trustee other than by Election.

In considering the rule of devolution of the rights and office of a trustee, the custom and usage of the particular temple must be gone into. Such questions are not settled by an appeal to general customary law: the usage of the particular temple or mutt stands as the law thereof. In this connection we may quote with advantage the dictum of Their Lordships of the Privy Council in *Ram Lakshmi Ammal V. Sivanantha Perumal*.² They said "Their Lordships are fully sensible of the importance and Justice of giving effect to long-established usage existing in particular districts and families in India, but it is of the essence of special usage modifying the ordinary law of succession that they should be ancient and invariable, and it is further essential that they should be established by clear and unambiguous evidence. It is only by means of such evidence that the Court can be assured of their existence and that they possess the conditions ambiguity and certainty on which alone their legal title to recognition depends." As repeatedly held by the Privy Council on a question of the right of succession to the office of trustee of a devastanam, in the absence of an instrument of trust, the only law applicable is the custom and practice, which are to be proved by evidence.³

SUIT FOR EMOLUMENTS ATTACHED TO THE OFFICE

Apart from the office of trusteeship there are various other office-holders who perform certain rites and ceremonies in the temple and claim such rites by hereditary succession. Such is the claim of certain Brahmin priests to officiate in certain temples. In some temples, in particular at the famous Koneswaran Temples at Trincomalee, There are vari-

1. See *Thamotberampillai V. Sellapah*, 34 N.L.R. 300.

2. 38 Mad. 491, 495-497.

3. 14 M.I.A. 570, 585.

4. See *Mohamt Labar Puri V. Mohamt Pura Nab*, 37 All. 298 P.C.

1. See *Ram Parakash Das V. Anand Das*, 43 Cal. 707, 714, P.C.

2. 14 M.I.A. 570 P.C. at page 585.

3. See *Ramalingam Pillai V. Vythilingam Pillai*, 16 I.L.R. Madras, 490 P.C.

ous officeholders who perform customary services for which they and their ancestors have been given Temple lands. If there is an infringement of such rights, can a person who is entitled to bring an action in a civil Court of Law? In this connection a distinction must be made between offices to which emoluments are attached and offices which carry with it only dignity and not any pecuniary benefit.

In the majority of cases the office is such that some emolument is attached thereto. Thus, the hereditary priests of a temple often have the right to appropriate the offerings given to the deity. In Ceylon the question has often arisen whether the hereditary right of a priest to officiate in a temple can be recognised by the Civil Courts. In an early case¹ the plaintiff alleged that he was a Brahmin priest, who over a period of thirty years had officiated as a priest of the temple at Kandaswamy Kovil, Trincomalee. He further averred that as such officiating priest he has the enjoyment, use and possession of the offerings and that the defendant ousted him from the temple three years before the action and deprived him of his revenue. He prayed for a declaration that he was the priest of the temple and as such was entitled to the receipt and appropriation of one-half of the revenue. It was held that the plaintiff was not entitled to the relief he sought as he did not have any title to the lands but only had possession and that a possessory action was not available as he had not brought such action within one year from the ouster. Withers, J., in the course of his judgment said "A District Court has no jurisdiction over purely ecclesiastical matters and cannot interfere in the concerns of religious communities, unless, in the rules which any religious community has made for its members in relation to the religious object which it has combined to maintain and support, a civil element enters which brings it within the sphere of the Courts civil jurisdiction. This element is one involving some rights of property, such as an estate in the land on which the temple stands, or in the fabric of the temple or a tenure of one or the other amounting to a beneficial user of the land and buildings erected on it for religious purposes. The holder of an office who has been duly appointed thereto by the religious community to which he belongs or who succeeds in due course to such office according to rules binding on the members of the community, has been and will always be supported in the exercise of that office, if there is attached to it, as an incident, some estate in tenure of, or right to the possession and enjoyment of, real or movable property." The main ground on which the case was decided is that this being a possessory action it was not brought within one year of the ouster. But the dictum of Withers, J., is of interest because it lays down the correct principles on this matter.

In *Supramaniya Aiyer V. Changarapillai*² the plaintiffs averred that they were entitled to a share of the office of priest in a Hindu Temple; That to the exercise of such right were attached certain emoluments; and that they had been unlawfully prevented by the defendants from entering the temple and exercising their office: and had thus suffered pecuniary loss and they prayed for a decree declaring their right to the share that they claimed of the office of priest, and restraining the defendants from interfering with them in the exercise of such rights, and condemning the defendants in the damages they had sustained. On a preliminary issue raised by the District Judge whether the right to officiate in a Hindu Temple and to receive the incomes appertaining to the office of priesthood is a subject within the scope of the jurisdiction of the Court and whether the plaint discloses a cause of action, the plaintiffs' action was dismissed. In appeal the order of the District Judge was reversed. Bonser, C.J., says: ³ "In this case there was an allegation that the plaintiffs were debarred

from using the temple. The principles of law which govern this case are stated very clearly by Lord Cranworth in *Forbes V. Eden*¹ where he says that 'save for the disposal and administration of property, there is no authority in the Courts, either in England or in Scotland, to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs. If funds are settled to be disposed of amongst members of a voluntary association according to their rules and regulations, the Court must necessarily take cognizance of those rules and regulations for the purpose of satisfying itself as to who is entitled to the funds. So likewise, if the rules of a religious association prescribe who shall be entitled to occupy a house, or to have the use of a chapel or other building.'

"If connected with any office in a voluntary association, there is the right to the enjoyment of any pecuniary benefit, including under that term the right to the use of a house or land, or a chapel or a school, then incidentally the Court may have imposed on it the duty of inquiring as to the regularity of the proceedings affecting the status in the society of any individual member of it.

"This case comes within the very words of Lord Cranworth's opinion. The plaintiffs allege that they hold an office in a voluntary association: that connected with that office there is a right of property, and that the right of property has been infringed. I am, therefore, of opinion that they have disclosed a good cause of action."

This view of Bonser, C.J., finds support in the ruling of the Privy Council in *Krishnamacharias and others V. Krishnasami and others*.² In this case the plaintiff averred that they had the exclusive right to the Adhiyapaka Mirass of reciting certain religious texts, hymns, or chants in a certain pagoda and its dependencies and denied the right of the defendants to recite them. They further stated that they were entitled to the performance of these services and to enjoy the incomes of the Apishesakam save those mentioned in Schedules B and C. They further stated that the defendants had appropriated to themselves this right wrongfully and were enjoying the income affecting thereto. The High Court dismissed the plaintiffs' action, holding that a reference to the schedules disclosed nothing more than a list of offerings to which no value is assigned and that reading the plaint and the schedules together they express nothing more than this, the presents and offerings usually given have been withheld. The Privy Council reversed this finding and held that the plaint disclosed a cause of action. The ordinary test as laid down by the Madras High Court in *Srinivasa V. Tiruvengada*³ is if there is any specific pecuniary benefit attached to the office claimable in the nature of wages, however small the benefit may be, the Court will take cognizance of such a right.

SUITS NOT COGNIZABLE BY CIVIL COURTS

As stated earlier, if a person does not hold any office and if no emoluments are attached to the office held by him and the suit is merely brought for the establishment of a religious right, the action is not maintainable in a civil Court. Thus, in *Loknath Missra v. Dasarathi Tewari*⁴ the plaintiff who was a worshiper of certain idols brought an action against the custodians of those idols to locate them in a certain temple situated at the eastern end of a particular road instead of another temple at the western end of the same road. There was no allegation that the plaintiff was prevented from worshiping the gods whilst in the western end. It was held that as this was a suit to establish certain religious rites and ceremonies and involved no question of the right to property or to an office, the Civil Court

1. *See Kurrukal V. Kurrukal*, I S.C.R. 354.

2. 1896, 2 N.L.R. 30.

3. 2 N.L.R. at 31.

1. L.R. 1 Sc. Ap. 568.

2. 1879, L.R. 6 I.A. 120; I.L.R. 2 Mad. 62.

3. 11 Madras 450.

4. I.L. R. 32 Calcutta, 102.

had no jurisdiction to entertain that. The case is different where a person is completely refused the right to worship in a temple. In *Nessammah V. Sinnetamby*¹ the plaintiff who was entitled to worship in a certain temple was asked to quit by the defendant on account of certain previous ill-feeling. The plaintiff brought an action for a declaration that she was entitled to worship in the temple. It was contended that a civil Court had no jurisdiction to hear such a case. The Supreme Court held that the right of a person to worship at a Hindu temple is a civil right enforceable in a Court of law. Dalton, J., said: "Although there seems to be no local decision on this point, there are several Indian authorities and the cases cited show that in such cases as this the right claimed by the plaintiff of entry to all parts of the temple is of a civil nature and within the cognizance of the civil Courts."² This decision followed the case of *Krishnasami Ayyanagar V. Samaran Singrachariar*³ where Wallis, J., in the course of his judgment states that the right of a worshipper to worship at a given temple is recognised by the Indian Courts as a civil right and the Courts would enforce by suit a right of worship to which the plaintiff proves himself entitled.⁴

A suit for the recognition of receiving certain marks of honour and recognition will not be maintainable. Thus in *Gossain Doss Chose V. Gooroo Das Chuckerbutty*⁵ the plaintiffs brought an action for a declaration of their right to receive at the hands of the priest of the village idol, at certain festivals, Motta and Polak and other marks of recognition and honour and to obtain damages from the priest for withholding these marks. It was held that the suit was not maintainable. Similarly where a person and his ancestors claim the right to perform certain pageants in Benares and to receive certain subscriptions in connection therewith and such performances were entirely voluntary, it was held that a Court of law had no jurisdiction to hear such a matter.⁶ In *Mathusudan V. Shriphan Karachariya*⁷ it was held that "to decide disputes as to precedence or privileges between purely religious functionaries is no part of the business of the Civil Courts nor will they grant injunction to prevent preachers from preaching where they live under any title they please, provided no office or property is disturbed or interfered with. For interference with a mere dignity no suits can be maintained."

ACTIONS RELATING TO PUBLIC CHARITABLE TRUSTS

We shall proceed to consider the procedure available under the law of Ceylon relating to public Charitable Trusts. At the outset of one's inquiry, in view of the wording of section 92 of the Indian Civil Procedure Code, a distinction should be drawn between a Public Charitable Trust and a Private Charitable Trust. A Public Trust differs from a Private Trust in important particulars. Though no hard and fast rule could be laid down to distinguish between the two, each case should be judged from inference drawn from the circumstances of the case.⁸ In a Public Trust, the beneficial interest is vested in an uncertain and fluctuat-

ing body and the trust itself is of a permanent character.¹ In the case of the Private Charitable Trust the beneficial interest is vested absolutely in one or more ascertainable individuals and the trust itself need not be a permanent one.²

Lord Hardwick put the matter clearly many years ago. He said in *Attorney-General V. Pearce*³ "The Charter of the Crown cannot make a charity more or less public but only more permanent. It is the extensiveness which will constitute it a public one. When testators have not any particular person in their contemplation, but leave it to the discretion of the trustee to choose out the object, though such person is private, and such particular object may be said to be private, yet in the extensiveness of the benefit they may properly be called public charities."

Secondly, to constitute a valid public charitable trust there must be proof of dedication. In some cases there may be a complete dedication, where the property is transferred to the idol. But there may be religious dedications of a less complete character as when a testator says that if there is any surplus income it shall go to the benefit of the family.⁴ When the property is completely given to the idol, as a pointed out by Sir Arthur Wilson in *Roy V. Debi*⁵ under the Indian Law, the idol is regarded as a juridical person holding property, though it is only in an ideal sense that property is so held.

Under our law the juridical personality of an idol is not recognised⁶ where property is transferred to an idol but the founder constitutes himself a trustee. Reference may be made to the terms of a deed of trust to find out whether there is complete dedication or not.⁷

Where there is no document or the terms thereof are ambiguous, one must look at the custom,⁸ treatment,⁹ surrounding circumstances¹⁰ and even the feelings and sentiments of the religious community to which the temple belongs.¹¹

In respect of a public charitable trust various actions are available, namely the vindicatory action, the possessory action, actions under sections 101 and 102 of the Trust Ordinance or applications under other provisions of the Trust Ordinance.

The vindicatory action

When a person claims to be trustee against another, the proper action to establish his right is an ordinary action for a declaration that he is a trustee. He cannot in such a case bring an action under sections 101 and 102 of the Trust Ordinance, because the object of these sections is not to determine the conflicting rights of private individuals but to devise the method for fully carrying out the purpose of the trust.¹²

1. 1933, 36 N.L.R. 75.
2. See *venkatachalapati V. Subbarayadu* and others, I.L.R. 13 Mad. 293.
3. I.L.R. 30 Madras 158.
4. *Appaya and others V. Padappa*, I.L.R. 23 Bombay 123 and other decisions are to the same effect-*vide* 36 N.L.R. 76.
5. 16 W.R. 198.
6. *Sangapa V. Yangapa*, I.L.R. 2 Bombay 476.
7. 33 I.L.R. Bombay 278, 291.
8. See *Mt. Promo V. Shoo Nath*, 1993, A.I.R. Oudh 22, 25

1. 1993 A.I.R. Oudh 22, 25; *Ram Das V. Basanti* 1992, A.I.R. All 519, 520.
2. *Ram Das V. Mt. Basanti*, 1992 A.I.R. All. 519, 210.
3. 2 Atk. 87.
4. See *Sonatum Bysack V. Sreemutty Juggutsoondree Dossee*, 1859, 8 Moore I.A. 66 and *Dutt V. Chatterjee*, 1879 L.R. 6 I.A. 182.
5. 31, I.A. 203
6. See the dictum of Bertram, C.J., in *karthigesu Ambalaranar V. Subramaniam kathiravelu*, 27 N.L.R. at 21.
7. See I.L.R. 13 Mad 66, 73 in *pathukutti V. Avathalutti*; I.L.R. 18 Mad. 201, 213, *kalebola Sabib V. Nuseerudeen Sabib*.
8. *Mohamed Esuf Sabib V. Abdul* 1919 A.I.R. v Mad. 515, 52.
9. *Abdul Sabib V. Hyderbey Sabib* 1919 A.I.R. Mad. 225, 226.
10. *Puran Atal V. Darshan Das*, II I.C.C. 166, 174.
11. *Sant Das V. Ram Bai*, 1913, 20 I.C. 295, 296.
12. See Chitaley Civil procedure code, Vol I, section 92 of I.C. P.C. for decision.

In such an action the lawful trustee may bring an action *rei vindicatio* in respect of the trust property without having resort to section 102 of the Trust Ordinance. It is competent for him even to ask for a vesting order in respect of the properties comprising the temporalities.¹

The Possessory Action

It is competent for a properly appointed trustee to bring a possessory action, if he has been in possession of the temple or trust property for a period of a year and a day, and if he brings his action within a year of the ouster.²

Even a *de facto* trustee could bring a possessory action if he can prove the elements referred to earlier. It is not necessary for him to obtain a vesting order for such purpose.³

ACTION UNDER SECTION 101 OF THE TRUST ORDINANCE

Analogous Law

Section 101 of the Trust Ordinance is based on section 92 of the Indian Civil Procedure Code⁴ and is an imperfect reproduction of Lord Romilly's Act⁵ and the Trustee Act.⁶ of 1850 in England. Lord Romilly's Act was passed for the purpose, as is stated in the preamble, of providing one more summary remedy in cases of breaches of trusts created for charitable purposes, as well as for the just and upright administration of the same. For discussion of Lord Romilly's Act.⁷

In India there is a conflict of opinion as to whether the decisions on Romilly's Act could be referred to for interpreting the provisions of section 92 of the I.C.P.C.⁸ where it was held that such decisions are relevant and the following cases where it was held that they are not relevant.⁹

The language of the English Act is materially different from that of the Code with the additional difference that the procedure under the English Act is summary and under section 92 of the Indian Civil Procedure Code it is by a regular action.¹⁰

The scope of section 101 of the Trust Ordinance is explained by Bertram, C.J., in *Kartigesu Ambalavanar V. Subramaniam*.¹¹ He says: "Section 101 deals with public charitable trusts generally. The machinery of that section is set in action either by the Attorney-General or two persons having an interest in the trust acting by his authority. Section 102 deals with a special class of charitable trusts, namely, those relating to places of religious resort. The machinery of this section may be set in motion by any five worshippers. The section does not apply to Christian Religious Trusts. To prevent the section being used for the pur-

poses of faction, it is declared that a certificate of the government Agent of the nature specified in sub-section 3 shall be necessary before such action is instituted. But the present action is not of this character. A paragraph in section 101 expressly reserves the right of any trustee to apply to the Court by action or otherwise under the general provisions of the Ordinance for the purpose of regulating the administration of the Trust or the succession to the trusteeship. And the Court is empowered on any such application to make such order as it may seem equitable. This provision applies both to section 101 and to section 102 and the final sentence of section 101 must be read subject to this circumstance." Thus it is clear that if the trust relate to any place of worship, or any religious establishment or place of religious resort, or in the performance of the worship or service thereof, then the action should be brought under section 102. But if the trust relates to any other express or constructive charitable trust, the application should be made under section 101. Section 101, sub-section 4, states "This section shall not apply to trusts governed by the next succeeding section." In view of the above sub-section, sections 101 and 102 are mutually exclusive sections.

Analysis of section 101

In order that section 101 of the Trust Ordinance may apply the following five conditions must be satisfied:-

- (i) there must exist a charitable trust, express or constructive;
- (ii) the plaintiff must allege that there was a breach of such an express or constructive trust or that the directions of the Court are necessary for the administration of such trust;
- (iii) the suit must be a representative one on behalf of the public and not individuals for their own interest;
- (iv) the relief claimed in the suit must be one of the reliefs mentioned in the section;
- (v) the Attorney-General himself must bring the action or two persons interested in such places should bring the action with the sanction of the Attorney-General.

These conditions must be considered in greater detail.

Existence of a Charitable Trust Express or Implied

The difference between the provisions of section 92 of the Indian Civil Procedure Code and Section 101 of the Trust Ordinance must be noted. Under the former the Trust must be for public purpose of a religious or charitable nature, but under the latter there must be a charitable trust. The term "Charitable Trust" is defined in the Trust Ordinance to include any trust for the benefit of the public or any section of the public within or without the Island of any of the following categories:-

- (a) for the relief of poverty; or
- (b) for the advancement of education or knowledge; or
- (c) for the advancement of religion or the maintenance of religious rites and practices; or
- (d) for any other purpose beneficial or of interest to mankind, not falling within the preceding categories.¹

The draft Ordinance of the Trust Ordinance states that this definition is taken from the decision of the House of Lords in *Income Tax Commissioners V. Pemsel*.² Since section 101 of the Trust Ordinance would only apply if the Trust is for the benefit of the public or a sec-

1. 1941, *Thambiab V. Kasipillai*, 42 N.L.R. 558.

2. See Prescription Ordinance.

3. See *Masson V. Matthes*, 40 N.L.R. 562, and *Changarapillai v. Chelliab*, 5 N.L.R. 270; also *Abdul Azeez V. Abdul Rabiman*, 1911, 14 N.L.R. 317.

4. Section 539 of the old Indian Civil Procedure Code.

5. 52 Geo. 100, 101.

6. 13 and 14 Vict. c. 60.

7. See Tudor on Charities, 1929 edit., P. 360 et seq.

8. See *Rangasani Naikan V. Varadappa Naikan*, A.I.R. 17 Mal. 462, 464.

9. *Sayad Husseinman V. Collector of Kaira*, A.I.R. 21 Bomb. 48, 52; *Sajedur Raja V. Gaur Mohun Das*, A.I.R. 24, Cal. 418, 424, *Subbayyar V. Krishan*, A.I.R. 14 Mad 186, 190.

10. 1905, 2 Cal. L.J. 461.

11. 27 N.L.R. 15 at 20.

1. Section 99 of Trust ordinance (Cap. 72.)

2. 1891, A.C. 531, 583.

tion of the public, private charities do not come under the purview of this section. The Word 'included' connotes that the definition is not to an exhaustive one. Whenever the word "include" is used in a statute it is intended to be enumerative and not exhaustive.¹ When it is intended to exhaust the signification of the word "interpreted" the word "means" is used.²

Requirements of a plaint

In order to invoke the provisions of this section the plaint must allege that there has been a breach of trust or that the declaration of the Court is deemed necessary for the administration of the trust. Under the corresponding section of the Indian Civil Procedure Code (section 92) it has been held that the section did not apply if there is no allegation of breach of trust.³

Since the wording of section 101 of the Trust Ordinance and section 92 of the Indian Civil Procedure Code is almost identical Indian decisions on the latter will be helpful. Where a breach of trust is alleged in a suit under section 92 but the Court decides that there has been no breach of trust, its jurisdiction in the matter ends.⁴ The words "an alleged breach of trust" do not mean that the trust alleged must be one admitted by the defendant.⁵ It is sufficient if the trustee sets up an adverse title of his own in the trust in order to constitute a breach of trust.⁶

The words "where the direction of the Court is deemed necessary for the administration of any such trust" must be interpreted as meaning "where the Court has to give direction in the nature of framing a scheme or otherwise for the administration of the trust."⁷ The mere appointment of a trustee is not such a direction as is contemplated by the section and therefore a suit for the appointment of a Mutavalli (trustee) without anything more is not within the section.⁸ But a suit for accounts of the trust property and in effect asking for directions as regards the trust fund is one which falls within the section.⁹ It is not necessary that in any case the plaint must allege that there is a breach of trust; it is sufficient if it alleges that the direction of Court is necessary for the administration of such trust.¹⁰

The suit must be in a representative capacity on behalf of the public

Section 101 of the Trust Ordinance which is based on sections 539 (old) of the Indian Civil Procedure Code (present section 92) only applied where the suit brought is representative in its nature. That is to say, the suit must be one brought by two or more persons as representing the general public in order to secure the proper administration of a public trust.¹¹ Thus, where a party sues, not to establish the general rights of the public, but to remedy a particular infringement of his undivided right in a public trust, the suit is not

within the section. Thus, a suit between two persons to decide which of them is the lawful trustee does not come within the purview of this section.¹ The reason is that the object of the section is not to determine the conflicting rights of private individuals but to devise the method for fully carrying out the purposes of the trust.²

One consideration which is relevant in coming to a conclusion whether an individual right has been infringed is whether apart from infringement of the rights of the general body, there is some damage special to the plaintiff in which other members of the general body are not concerned.³ Where a person, whose individual rights are affected, sues a trustee for relief specified in the section, the suit will nevertheless not be governed by the section inasmuch as it is not a representative suit on behalf of the public but an action the enforcement of his own rights.⁴ Thus, where one trustee sues his co-trustee for accounts, he sues only in his individual capacity and consequently the suit does not fall within section 92 of the Indian Civil Procedure Code.⁵ But the Indian Courts are not unanimously agreed on this point.⁶

The suit must be one asking for one of the reliefs specified in the section

It has been held that the corresponding Indian section 92 is limited in its application to suits for reliefs strictly confined to the reliefs mentioned in that section. Hence, unless a suit prays for relief so specified, the section will not apply. As to what suits are not within the section.⁷ Section 101 of the Trust Ordinance contemplates the following reliefs:-

- (a) removing any trustee or trustees of the charity and if necessary appointing new trustees thereof;
- (b) directing accounts and inquiries;
- (c) declaring what proportion of the trust property or of the interest therein shall be attached to any particular object of the trust;
- (d) authorising the whole or any part of the trust property to be let, sold mortgaged or exchanged;
- (e) settling a scheme for the management of the trust;
- (f) granting such further or other relief as the nature of the case may require.

Under the old Indian Code (section 539) there was a conflict of opinion as to whether a prayer in a scheme suit for the removal of a trustee could be granted by the Court.⁸ This controversy was set at rest by legislation which expressly gave the Court the power to remove a trustee under section 92 of the New Indian Civil Procedure Code-Section 101 of the Trust Ordinance confers this power expressly on our Courts.

The guiding principle in granting or refusing a prayer for the removal of a trustee under this section, is to see whether in the particular case it is for the welfare of the trust to do so.⁹ Every mistake or neglect of duty or inaccuracy of conduct is not necessarily a ground for removal.¹⁰ But where a trustee asserts an hostile title in himself to the trust properties, or lacks capacity to manage he will be removed.¹¹

1. *R.V. Raman Jiyia*, 1878, 2 mad. 5.
2. *Per Innes and Forbes, JJ.* see also *R.V. Nagla kala*, 1896, 22 Bomb. at 235 and *Bahadur V. Mallick*, 1910, I.L.R. 37 Cal. 643.
3. See *Babaji V. Govindal*, 1916 A.I.R. Bomb. 281, 282.
4. See *Brij Lal V. Shevanath prasad*, 1916 A.I.R. Patna 306
5. See 1911, 13 Bomb. L.R.49.
6. *Srinwasa Charear V. Eval Appu Mudaliyar*, I.L.R. 45 Mad. 565; 49 Ind. App. 237, P.C.
7. 1928, A.I.R. Cal 368 370; 55 cal 1284, *Abdul Alim Abed V. Cal.* 1284.
8. See *Abdul Alim V. Abis Jan.*, 1928 A.I.R. cal. 368, 370; 55 Cal. 1284.
9. *Narayan V. Vasudeo*, 1924 A.L.R. Bom. 518.
10. See *chaganlul V. Sobharam*, 1934 A.I.R. Bomb. 26, 27-28.
11. See *Parmeswaran V. Narayanan*. (1917) A.I.R. mad. 389, 390.

1. See *Budree Das Makim V. Chooni Lal*, 1906 A.I.R. 33 Cal 789, 807.
2. See *Mohamed Ismail V. Ahmed Moda*, 1916, A.I.R. P.C. 132, 136; 43 Cal. 1085 P.C.
3. *Bashikat V. Srinivasa Thatha Chariar*, 1927, A.I.R. Mad. 551, 555.
4. *Lakshminarayana V. Punneyya*, 1927, A.I.R. Mad. 820, 823.
5. *Appana V. Narasingha*, 1922, A.I.R. Mad 17, 18-20; 45 Mad. 113 F.B.
6. I Chitaley 809, 4th ed.
7. See I Chitaley 814, 4th ed.
8. I Chitaley 817, 4th ed.
9. *Manohar V. Peary Moban*, 1920 A.I.R. Cal,210 (222)
10. *Azizor V. Abidenessa*, 1928, A.I.R. Cal 225 (226),
11. See I Chitaley 665,

The Court also has power to appoint a new trustee in place of an old trustee who has been removed. Hence, the section applies only where a new trustee is sought to be appointed in the place of an old one and not to a case where a Court has asked to appoint a new trustee.¹ But a suit for appointment of new trustee on the ground that defendants are not lawful trustees and therefore office of trustee is vacant was held to be covered by section 92, clause (b) of the Indian Civil Procedure Code A.I.R. (1903)26 Mad. 450 (452) *Neti Rama V. Venkatachannul*.

Section 101 also gives to a Court of law the power to direct accounts. This claim is not found in the section 539 of the old Indian Civil Procedure Code but is an innovation in the new Code (see page 92). Relief c,d,e, and f are also taken from section 92 of the Indian Civil Procedure Code. The guiding principles in settling a scheme are stated by the Privy Council in *Mohamed Ismail Ariff V. Ahmed Mowla Dawood*.² Mr. Ameer Ali, who delivered the judgment of Their Lordships, said³:-

"In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder so far as they can be ascertained, but also the past history of the institution and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustee in the future."

In such a scheme it is competent for the Court to recognise the rights of a hereditary trustee.⁴ The main thing to be remembered is the welfare and interests of the trust.⁵ The framing of a scheme is largely a matter for the discretion of the Court.⁶ In so doing a Court is not restricted to the arrangement contemplated by the author of the trust though as a general rule it must not depart from it except for strong reasons.⁷ Thus a Court can provide for the management by co-trustees in rotation or otherwise alter the original scheme in the interest of the institution.⁸

In settling a scheme for the management of a charitable trust under section 108 of the Trust Ordinance the Court is empowered to make order providing for-

- (a) periodical auditing of accounts;
- (b) visitation of the charity;
- (c) remuneration of trustees;
- (d) the devoting of surplus proceeds to the extension of charitable objects by applying the Cypres doctrine.

The words "such other and further relief as the nature of the case may require" require explanation. They mean relief *ejusdem generis* with those described by the preceding clauses. They cover every subsidiary order or direction on any matter of detail for carrying out the main purposes of the section.⁹

1. *Abdul Alim V. Abir Jan*, 1928 A.I.R. CXAL. 368 (370) 55 Cal. 1284.

2. 43 I.A. 127 at 135.

3. 43 I.A. at 135.

4. *Veeraragava Thathachanar V. Sirinivasa Thathachariar*, 1912, 16 Indian CAses 225 (233) Mad. See also 27 N.L.R. 173, *Kurrukal V. Kurrukal* (a decision under section 102 of the Trust Ordinance.)

5. 1926 A.I.R. Mad. 1150 (1153) *Venkataraman V. Damodaran*.

6. 1912 Vol. XVII I.C. 441 (442) P.C. *Sevak Kirpa V. Gopal Rao*.

7. 1923 Pat. 420 (421) *Mohamed Wahab V. Abbas Husain*.

8. 1 Chitaley 669.

9. *Dharam Das V. Dharam Das*, 1917 A.I.R. All. 336 (337), 47 All. 770; 1889 A.I.R. 12 Mad. 157 (161) *Narasimha V. Chetti*.

Effect of adding other Reliefs

A suit for a relief specified will not be taken out of the scope of the section merely because a subordinate or consequential relief, not specified in the section, is asked for in addition to a relief so specified.¹

Sanction of the Attorney-General

The suit under section 101 of the Trust Ordinance must be brought by the Attorney-General or by two persons interested in this trust with the sanction of the Attorney-General. This provision is taken from section 539 of the old Indian Civil Procedure Code which itself is based on Lord Romilly's Act. In England the Attorney-General had supervisory powers over charities and hence Lord Romilly's Act; he was regarded as the proper person to bring the action. The object of the sanction is to protect the trust property as well as the trustees from an indefinite number of vexatious and harassing suits being brought against the trustees.²

In granting the consent in writing required by the section, the Attorney General has to exercise his judgment and see whether the petitioners have an interest in the trust, whether the trust is one contemplated by the section and whether there is a *prima facie* case of a breach of trust.³

The fact that the Attorney-general has refused to grant sanction will not preclude him from giving his sanction subsequently on further consideration.⁴

The obtaining of the consent of the Attorney-General is a condition precedent to the valid institution of a suit under this section. Where no such consent has been given the defect cannot be covered by the granting of subsequent sanction. But once sanction has been obtained but the suit is otherwise defective and in order to remedy such defect the Court adds other parties who subsequently obtain sanction, such sanction will relate back to the date of institution.⁵

Effect of a Decree in an action under section 101 of the Trust Ordinance

It has been held in India that a decree passed under the corresponding section (section 92) of the Indian Civil procedure code is binding not only on the trust and the trustee but also on all worshippers of the temple.⁶ In the objects and reasons of the Trust Ordinance it is stated this provision of the Indian Act was not introduced into Ceylon because it will foster litigation and create factions and hence proceedings before a Commissioner are substituted.

It has been held in India that a sanction granted under section 18 of the religious Endowment Act is a condition precedent to the exercise of the right of suit. This section has to be construed strictly without enlarging its scope.⁷ In *Thambipillai V. Kumaraswamy V. Kumaraswamy Kurrukal*⁸ when seventy-nine persons presented a petition to the Government Agent of a Province in compliance with the requirements of section 102 of the Trusts Ordinance

1. 1928 A.I.R. Mad. 205 (207) *Sudarsanachary V. Suryanarayanan*.

2. 1905 A.I.R. 32 Cal. 273, 276.

3. See 1907 A.I.R. 24 Cal 418 (428) *Chowdhuri V. Mohun Das*; 1915 A.I.R. Bombay 38 (39,40); 39 Bombay 580 *Sulaiman V. Shaikh Ismail*; 1930 A.I.R. Mad. 129 (131) 53 Mad. 223, *Pithayya V. Venkatakrishnama charlu*.

4. 1934 A.I.R. Bombay 257 (259) *Maber Husein V. Ali Mobamed*.

5. 1 Chitaley 674.

6. See *Veeraraghava Achariar V. Parthasarathy Iyengar*, 1925 A.I.R. Mad. 1070 (1072), 12 Indian Cases 449 (452); 36 Mad. 364 *Rama Das V. Manumantha Row*.

7. *Venkatesha Malia V. Ramanya Hegade* 38 Mad. 1192.

8. 1945, 46 N.L.R. 557.

nance, praying for the appointment of a commission to inquire in to the subject-matter of the plaint and for a certificate from the Government Agent, in terms of paragraphs (a) and (b) of section 102 (3) of the Trusts Ordinance,¹ it was held that having obtained the Government Agent's Certificate, it was not necessary for all seventy-nine petitioners to join as plaintiffs and that five or more of them could institute the action. It was held further, that when eight of the seventy- nine petitioners and four strangers to the petition instituted action, the Court could permit the four strangers to withdraw from the action and action to proceed there after.

In an action under section 102 of the Trusts Ordinance² the question of debt is one of the matters for the consideration of the Court quite independently of the inquiry by the Government Agent if the question is raised before the court.³

The reason is that a suit under section 92 of the Indian Civil Procedure Code is a representative one.⁴

Action under section 102 of the Trusts Ordinance

Section 102 of the Trusts Ordinance is taken from section 14, 15 and is of the Religious Endowments Act, 20 of 1863 of India,⁵ The India section 14 of the religious Endowments Act 20 of 1863 reads as follows:-

"Any person or persons interested in any mosque, temple or religious establishment or in the performance of the worship or of the service thereof, or the trust relating thereto may, without joining as plaintiff, any other person interested therein, sue before the Civil Court, the trustee, manager, or superintendent of such mosque, temple, or religious establishment or the member of any committee appointed under this Act, for any misfeasance, breach of trust, or neglect of duty, committed by such trustee, manger, superintendent, or member of such committees in respect of the trust vested in, or confided to thaem respectively and the civil court may direct the specific performance of any act by such trustee, manager, superintendent, or member of a committee and may direct the removal of such trustee, manger, superintendent, or member of a committee."

Thus, when one compares the provisions of this section with those of section 102 of the Trusts Ordinance it is clear that it is based on the Indian section There are, however, differences between the two. The words relating to a member of a committee are dropped out because under the Indian Religious Endowment Act committees were appointed to have powers over certain temples, while in Ceylon in the absence of any Religious Endowment Acts there is no such (a-e) provision. The relief mentioned in section 102 of the Trust Ordinance is partly taken from section 92 of the Indian Civil Procedure Code and partly from the provisions of the Religious Endowment Act.⁶

Section 102 (2) is taken from Section 15 of the Indian Religious Endowment Act No. 20 of 1863. Section 102 (3) of the Trusts Ordinance is new. Under section 18 of the Indian Religious Endowment Act no suit could be maintained under section 14 of the Act without a preliminary application being first made to the Court for leave to institute suit.

1. Cap. 72.

2. Cap. 72.

3. See Soertsz, A.C.J., in *Tambypillai V. Kumavaruamy Kurrukal*, 46 N.L.R. 557 at 558.

4. 1921 A.I.R. P.C. 123 (124) *Raja Anand Rao V. Ramdas Daduram*, 48 Cal. 193 (497, 498) P.C.

5. See objects and reasons to the Trusts Ordinance.....

6. Section 14, Act 20 of 1863.

A suit instituted under section 14 of the Indian Religious Endowment Act does not abate on the death of one of the plaintiffs.¹ A similar view was taken by the Privy Council in a suit under section 92 of the Indian Civil Procedure Code as Their Lordships took the view that such a suit is not prosecuted by individuals for their own interest but as representatives of the general public.²

Section 103 of the Trusts Ordinance is based on section 16 of the Religious Endowment Act of India giving the power to a Court of law to refer such a matter for arbitration on an application by the Commissioners appointed under section 103 to examine witnesses, etc, Section 105 gives power to a Court of law to inquire into accounts in an action. Under section 102 to make any of the orders mentioned therein.

A comparison of section 101 and 102 of the Trusts Ordinance

Section 102 of the Trusts ordinance only applies to trusts relating to places of worship, or any religious establishments or piaces of religious resort, or places for the performance of the worship or service thereof. Any other kind of trusts will come under section 101 of the Trusts Ordinance. In India, in view of the words used in section 92 of the Indian Civil Procedure Code and section 14 of the Religious Endowment Act, the procedure indicated by these provisions are optional and parties may elect to choose either of these, so far as the forms of so far as the forms of relief to which they relate are the same.³ But, as stated earlier, in view of section 101 (4), sections 101 and 102 of the Trusts Ordinance are mutually exclusive sections. In an action under 101 the action must be brought by the Attorney-General or by two or more persons having an interest in the trust with his sanction, but in an action under section 102 the action can be brought by any five persons interested in the place of worship with the written consent of the Government Agent. Under section 101 a Court cannot make a vesting order, but under section 102 such an order can be made. Section 102 read in conjunction 102 read in conjunction with section 105 gives further powers to a Court of law. Section 101 contemplates the existence of a valid trust and a trustee. Section 102 could be brought even for the removal of a *de facto* trustee, or manager of a temple. In framing a scheme under section 102, the Court shall have regard to religious custom or usage of the place in view of section 106. Section 106 is based on the decision of *Tamtakar V. Govind Ram*,⁴ but in settling a scheme under section 101, section 106 will not apply.

In many other respects the principles governing actions under both sections are similar. Thus both are representative actions, and the essentials of the actions *matatis mutandis* are the same. The provision in section 101 empowering a trustee to bring any action under the Ordinance without complying with section 101 equally applies. Section 102.⁵

It is competent for a Court of Law to appoint a receiver in an action under section 102 of the trusts ordinance as it is an action within the meaning of the Civil Procedure Code.⁶

Under section 102 of the Trusts Ordinance a Court could make order vesting properties in trustees. As stated earlier this provision is taken from section 92 of the Indian Civil Procedure Code. Under this provision it has been held in India that this claim gives power to the court where it removes a trustee and appoints a new trustee to vest the trust property in the new trustee.¹ It is not intended to cover cases in which it is sought to recover

1. *Alagappa V. Hathea*, 41 Mad. 237.

2. *Raja Anand Rao V. Ramdas Daduram*, 1921 A.I.R. P.C. 123 (124) 48 Cal. 493 P.C.

3. See *Venkataranya v. Krihnamacharlia*, 37 Mad. 184.

4. 1887 I.L.R. 12 Bombay 247.

5. See 27 N.L.R. 15.

6. *Sathasivam v. Vaitbianthan*, 1921, 23 N.L.R. 215.

possession of the trust property by ejecting trespassers who are in wrongful possession.² Hence, in view of the different wording of section 102, whenever a Court removes a superintendant, a manager or a trustee and appoints new trustees, it can make a vesting order vesting trust property in the new trustees.

Nature of Decree order Section 102 of the Trusts Ordinance

In a suit under section 102 of the Trusts Ordinance all reliefs claimed thereunder need not and frequently cannot be embodied in one decree, but decrees may be issued from time to time³. Thus the case of *Chinnathamby v. Somasundera Iyer*⁴ in an action under section 102 of the Trusts Ordinance, the case was settled, a vesting order was made vesting the temple and its temporalities in the trustees elected under the scheme. The Trustees were authorised to take all necessary steps in law to take charge of the temple properties by the terms of the scheme. The plaintiffs obtained an ex-parte decree against the defendants to eject them and when the Fiscal went to execute the decree, the 5th and 6th defendants, who were not parties to the action, resisted him, whereupon the plaintiff sought relief under section 325 of the Civil Procedure Code, and in accordance with the provision of section 327 the petition was duly registered as a plaint. On certain preliminary issues the District Judge dismisses the plaintiff's case, holding that the plaint did not disclose a cause of action. In appeal this finding was reversed. It was held that a decree holder in the position of the plaintiff need not comply with all the technical requirements of the Civil Procedure Code, non-compliance with which might prove fatal to an actual fresh action brought by them; nor is there any question of this having to show a cause of action as they have a decree and the onus is on the claimant to support his claim. It was also held that a decree directing the delivery of trust property of a temple to new trustees is executable and not declaratory and all relief obtainable under section 102 need not and frequently cannot be entered in one decree, but that decrees may be issued from time to time as the necessary arose⁵.

Compromise of a suit under Section 102 of the Trusts Ordinance

The question as to whether a suit under section 102 of the Trusts Ordinance can be compromised has been considered in 49 N.L.R. 127. In this case an action was instituted under section 102 of the Trusts Ordinance for a declaration that a temple in Nainativu should be declared a public charitable trust. On the date of trial the parties compromised the suit. It was admitted by the defendant that the temple in question was a public charitable trust and provision was made for a trust scheme to be filed. On the next date a draft scheme was filed by the plaintiffs ignoring the rights of some of the defendants who were alleged to be hereditary trustees. The defendants objected to the scheme and asked the Court to adjudicate on the issue of hereditary trusteeship. On the date of trial fixed for the hearing of this matter parties again compromised the matter, and of consent it was agreed that four of the defendants as hereditary trustees should be included in the Board of Trustees. Thereupon some of the plaintiffs who were absent but who were represented by proctor and counsel filed papers to vacate the order of compromise entered and when this application was refused appealed from this report and filed restitution papers to set aside the order compromise. The Supreme Court dismissed the appeal and refused the application

and held that the Court had jurisdiction to make an order based on a compromise but when a compromise bearing a taint of collusion or lack of *bona fides* presented to Court, it should not be given effect to." Nagalingam, J., cited the case of *Syed Abu Mohamed Burakal Ali v. Abdul Rahim*¹ for this view of the law. He also observed that under section 106 of the Trusts Ordinance power was given to a Government Agent to recognise a compromise.

The Indian cases on the point whether an action under section 92 of the Indian Civil Procedure Code can be compromised are conflicting. The earlier view was that such suits cannot be compromised². But the later view is that any lawful compromise will be valid but any collusive compromise will not be recognised by the Courts³.

Vesting Orders

Section 112 of the Trusts Ordinance deals with vesting orders. It says that the Court may make a vesting order in two cases:-

- (a) where it is uncertain in whom the trust property is vested;
- (b) when a trustee or any other person in whom title is vested asked to transfer it in writing and he refuses to transfer it section 112 (b) contemplates cases where the title is vested in some person and section 112 (a) applies to cases when it is uncertain in whom the title to trust property is.

Section 112 is based on the provisions of the English Charitable Acts.

Section 113 of the Trusts Ordinance is modelled on the Indian Religious Society Act⁴ and provides for the devolution of trust property when a trustee functions as such as a holder of a public office.

Finally, section 114 gives the power to the Governor to incorporate certain charities.

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1. A.I.R. 1925, Cal. 187.
 2. See A.I.R. 1919 Cal. 193.
 3. See A.I.R. 1925 Cal. 187.
 4. See objects and reasons in Trusts Ordinance.

1. 1906, 28 All. 112 (117) *Ghazaffargan v. Yawas Hussain*.
2. *Johnson D.P.O. Min v. U. Ogh.*, 1932 A.I.R. Rang 132 (136) 10 Rang 342.
3. *Varadaiah Chetty v. Nirasimbalu Chetty*, 1932, A.I.R. Mad. 41.
4. 1947, 48 N.L.R. 515.
5. See 48 N.L.R. at 518.

APPENDIX II
THE THESAWALAMAI ORDINANCE

CHAPTER 51.

THE THESAWALAMAI.

Regulation No.18 of 1806. Ordinance No. 5 of 1869.

A Regulation for giving full force to The Tesawalamai or The Customs of the Malabar Inhabitants of the Province of Jaffna, as collected by Order of Governor Simons in 1706.

(9th December, 1806)

Short title

1. This Regulation may be cited as the Tesawamai Regulation.

Tesawalamai as collected by Governor Simons to be force.

2. The Tesawalamai, or customs of the Malabar inhabitants of the province of Jaffna, as collected by order of Governor Simons, in 1706, shall be considered to be in full force.*

What question smay be decided according to Tesawalamai.

3. All questions between Malbar inhabitants of the said province, or wherein a Malabar inhabitant is defendant, shall be decided according to the said customs.

Question which relate to the right and privileges of castes to be decided according to Tesawalamai.

4. All question that relate to those rights and privileges which subsist in the said province between the higher castes, particularly the Vellales, on the one hand, and the lower castes, particularly the Covias, Nalluas, and Palluas, on the other, shall be decided according to the said customs and the ancient usages of the province.

(Promulgated by Dutch Government of Ceylon in the year 1707.)

Description of the Jaffnapatam Ancient Customs and Rules according to which persons of this Province are in the habit of recovering in Civil Matters, such as Inheritances, Adoptions, Gifts, Seizure, Purchase and sale, Pledging and Redemption of Land and Gardens, &c., drawn up and collected by me, the undersigned, pursuant to the Order of Our honourable Commandeur the Governor of Ceylon, Cornelis Joan Simons, and the council at Colombo, by Letter dated 14th August, 1706, directed higher, according to the experience which I, in the period of seven and thirty years that I have been passing here, of which said period most has been in this Province, have acquired.

* So Much of the provision of the Tesawalamai as is with the Jaffa Matrimonial Rights and Inheritance Ordinance, is repealed by that Ordinance.

THE THESAWALAMAI ORDINANCE

PART I.

**OF INHERITANCES AND SUCCESSION TO
PROPERTY.**

1. Different kinds of property.
2. Of dowry.
- 3-6. Of the marriage of daughters and the dowry given with them.
7. Of the marriage of sons and their portions.
8. Of resignation of property.
9. Of succession to property where children and their mother are left.
10. Property how to be divided where the mother marries again.
11. Of succession to property where children and their father are left.
12. Of the division of property where orphan children are left.
13. Division of property where there are half-brothers and sisters.
14. Division of property where there is issue of both marriages.
15. Division of property where two persons, each being the sole child of their respective parents, die without issue.
16. Property how to be divided where it has been improved.
17. How where a Pagan marries a Christian woman.
18. How where two Pagans intermarry.

I will commence by stating that a man and woman being married all descending heirs must proceed from them, and from them likewise can be indicated the inheritance in the ascending relation.

DIFFERENT KINDS OF PROPERTY

1. From ancient times all the goods brought together in marriage by such husband and wife have from the beginning been distinguished by the denomination of *modesium*, or hereditary property, when brought by the husband, and when brought by the wife were denominated in the Tamil language *chidenam*, or by us *dowry*; the profits during marriage are denominated *tediatetam*, or *acquisition*. On the death of the father all the goods brought in marriage by him should be inherited by the son or sons, and when a daughter or daughters married they should each receive dowry, or *chidenam*, from their mother's property, so that invariably the husband's property always remains with the male heirs, and the wife's property with the female heirs, but the acquisition or *tediatetam* should be divided among the sons and daughters alike; the sons, however, must always permit that any increase thereto should fall to the daughters' share.

OF DOWRY.

2. But in process of time, and in consequence of several changes of Government, particularly those in the times of the Portuguese (when the Government was placed by order of the King of Portugal in the hands of Don Philip Mascarnha), several alterations were gradually made in those customs and usages, according to the testimony of the oldest Mutaliyars, so that, at present, whenever a husband and wife give a daughter or daughters in marriage the dowry is taken indiscriminately, either from the husband's or wife's property, or from the *acquisition*, in such manner as they think proper, that is to say, by parts and pieces, for there is scarcely any person who can say that he possesses the sole property of entire pieces of ground, gardens, companies of slaves, &c., for it will generally be found that he is actual owner of not more than the half or one-sixteenth part or less of the property.

OF THE MARRIAGE OF DAUGHTER AND THE DOWRY GIVEN WITH THEM

3. The nearest relations either on the farther's or mother's side from a particular regard to the bride, in order that such bride may make a better marriage, often enlarge the dowry adding some of their own property to it; and such a present should be particularly described in the *doty*, *marriage act*, or *ola*, which must specify by whom the present or gift is made, and the donor must also sign the act or *ola*; but such a donation or gift is voluntary. When the act of *doty* is executed it is presumed that it is done without fraud, but the donor does not point out therein what his share is of the pieces of ground, gardens, or slaves which he gives by pieces to his daughter or daughters, but says merely "such and such part of such a piece of ground," so that frequently, the receiver or bridegroom finds himself deceived in his expectations, which always causes differences and disputes, for many often expect to get a sixth part when they do not get more than one-sixteenth. For instance, a husband and wife having five children, namely two sons and three daughters, and possessing a quarter or fourth part of a ground called *Varakkuli*, of which they give as a dowry to each of their daughters, when they marry, a fourth part of their (the Husband's and wife's) share in the said ground, which together is three-fourths, and retain to other one-fourth for themselves as long as they live; but after their death the two sons come and take each the half, consequently the daughters have no more than one-sixteenth part each of the said ground, and the two sons each but one thirty-second part; and it is the same with the donation of gardens, slaves, &c., from which often disputes also arise. The daughters must content themselves with the dowry given them by the act or *doty ola*, and are not at liberty to make any further claim on the estate after the death of their parents, unless there be no more children, in which case the daughters succeed to the whole estate. And in case the new-married couple, to whom one or more pieces of the said gardens, slaves, &c., have been given in marriage, do not take possession thereof within ten years, they forfeit their claim thereto: for there has been of old, since the time of the Tamil kings, a proverb, *Ot2t2iyum chitanamum pat2t2iya11*, that is, immediate possession must be taken of dowry and pawns. If this be not done, the lands, gardens, slaves, &c., again become a part of the common estate in the same manner as if they had never been given to the young married couple, unless they can produce an act of their parents concerning their delay in taking such possession.

4. If a father or mother gives as a dowry to their daughter or daughters a piece of land or garden which is mortgaged for a certain sum of money, and say in the *doty ola*, "a piece of land called *Kal2uvanpan2ku*, which is mortgaged to *Kantar Pu1tar* for sixty fanams: but which the bridegroom and his bride must redeem for that money," and if they are unable to do it, and the mortgagee does not wish to retain any longer the mortgage for the money lent by him, the parents themselves are obliged to redeem it; and notwithstanding (although it be fifty years afterwards) the said mortgaged land or garden devolves again to the child to whom it was originally donated by the *doty ola*, provided the money for which it had been mortgaged is paid by such a child.

5. If one or more pieces of land, garden, or slaves, &c., are given as a marriage gift, respecting which at the expiration of some years a lawsuit arises, and the young couple lose the same by the suit, the parents who gave the same (and after their decease the sons) are obliged to make good the loss of the land, garden, or slaves, &c., for a well-drawn up and executed *doty ola* must take effect because it is by this means that most of the girls obtain husbands, as it is not for the girls but for the property that most of the men marry; therefore, the dowry they lose in the manner above stated must be made good to them, either in kind or with the value thereof in money.

Should it happen that after the marriage of the daughter or daughters the parents prosper considerably, the daughters are at liberty to induce their parents to increase the *doty*, which the parents have an undoubted right to do.

If all the daughters are married in the manner above stated, and each has received the dowry then given by their parents, and if one or more of them dies without issue, in such case the property indisputably devolves to the other sisters, their daughters, and grand-daughters; but if there should be none of them in existence, the property in such case falls in succession to the brothers, their sons, and grandsons, if any; if not, the property reverts to the parents, if alive; and if not, the father's *modesium*, or hereditary property, and the half of the *tediatetam*, or acquired property (after deducting therefrom the half of the debts), devolves first to his brother or brothers, then to their sons and grandsons; and the mother's *chidenam*, or dowry, with the other half of the acquired property, after deducting therefrom also the remaining half of the debts, devolved to her sister or sisters, their daughter, or grand-daughters, *ad infinitum*.

6. Although it has been stated that where a sister dies without issue the dowry obtained by her from her parents devolves to her other sister or sisters, yet it sometimes happens that her mother, having in the meantime become a widow and poor, requests the sister or sisters of the deceased to allow her to take possession of the property of her deceased daughter, and to keep the same as long as she lives, to which they sometimes agree, but are by no means bound to do it; but in order that they may not subject themselves to any loss, they ought to have the property described and registered, otherwise on the mother's death the son or sons will come and take possession of all that she has left.

OF THE MARRIAGE OF SONS AND THEIR PORTIONS

7. Having pointed out the manner in which the daughters are given in marriage, and what becomes of their property when they die, I will now proceed to state what relates to the sons. So long as the parents live, the sons may not claim anything whatsoever; on the contrary, they are bound to bring into the common estate (and there to let remain) all that they have gained or earned during the whole time of their bachelorship, excepting wrought gold and silver ornaments for their bodies which have been worn by them, and which have either been acquired by themselves or given to them by their parents, and that until the parents die, even if the sons have married and quitted the paternal roof.

So that when the parents die, the sons then first inherit the property left by their parents, which is called *modesium*, or hereditary property; and if any of the sons die without leaving children or grandchildren, their property devolves in the like manner as is said with respect to the daughters' property, which devolves to the women as long as there are any. The property of the sons, therefore, devolves to the men, and in failure of them to the women; and although the parents do not leave anything, the sons are nevertheless bound to pay the debts contracted by their parents, and although the sons have not at the time the means of paying such debts they nevertheless remain at all times accountable for the same; which usage is a hard measure though according to the laws of the country.

OF RESIGNATION OF PROPERTY

8. Should it happen that age renders the parents incapable of administering their own acquired property, the sons divide the same, in order that they may maintain their parents with it, and it will be often found that sons know how to induce their parents to such a division or resignation of their property, with a promise of supporting them during the rest of their life; but should the sons not fulfil their promise, the parents are at liberty to resume the property which has been so divided among the sons, which is not done without a great

deal of trouble and dispute. And the experience of many years has taught us that such parents (in order to revenge themselves on their sons) endeavour by unfair means to mortgage their property for the benefit of their married daughters or their children; and for this reason it has been provided by the *Commandeur* that such parents may not dispose of their property either by sale or mortgage without the special consent of the *Commamdeur*, which is now become a law.

OF SUCCESSION TO PROPERTY WHERE CHILDREN
AND THEIR MOTHER ARE LEFT.

9. If the father does first leaving one more infant children, the whole of the property remains with the mother, provided she takes the child or children she has procreated by the deceased until such child or children (as far as relates to the daughters) marry; when the mother, on giving them in marriage, is obliged to give them a dowry, but the son or sons may not demand anything so long as the mother lives, in like manner as is above states with respect to parents.

PROPERTY HOW TO BE DIVIDED WHERE THE MOTHER
MARRIES AGAIN

10. Should, however, the mother marry again and have children by her second marriage, then she does with the daughters as is above stated with respect to parents. But it is be understood that if she has daughters by her first husband she is obliged to give them, as well as the daughters by her second husband, their dowries from her own *dowry* property; and if the son or sons marry or wish to quit her, she is obliged to give them the hereditary property brought in marriage by their father and the half of the aquired property obtained by the first marriage, after deducting therefrom the dowry which may have been given to the daughters.

If the mother of whom we have just spoken also dies, the both of the first and second marriage, succeed to the remaining property which the mother acquired by marriage; besides which such son or sons are entitled to the half of the gain acquired during the mother's marriage with has or their father, and which remained with the mother when he or she married, and provided that therefrom are also to be paid the debts contracted by her or their father when alive.

But if any part of that property is diminished or lessened during the second or last marriage, then the second husband, if he still be alive, or if he be dead, his son or sons, are obliged to make good the deficiency, either in kind or in money, in such manner as may be agreed upon.

On the other hand, the son or sons of the second marriage are entitled to the hereditary property brought in marriage by his or their father, and also to the property acquired during marriage, after all the debts contracted by him shall have been paid from the same.

OF SUCCESSION TO PROPERTY WHERE CHILDREN AND
THEIR FATHER ARE LEFT.

11. If the mother does first, leaving child or children, the father remaining in the full possession of the estate so long as he does not marry again, and does with his child or children and with his estate in the like manner as is above stated with respect to the mother.

If a father wishes to marry a second time, the mother-in-law or nearest relation generally takes the child or children (if they be still young) in order to bring them up; and in such case the father is obliged to give at the same time with his child or children the *whole* of the property brought in marriage by his deceased wife and the half of the property acquired during his first marriage. When those children are grown up and able to marry, that is to say, the daughters (if any there be), the father must to go the grandfather or grandmother with whom the children are, in order to marry them and to give them a dowry both from their deceased mother's marriage portion and from the acquired property, which, as before stated, had been given to the relations with the children, and from his own hereditary property.

This being done, and if anything remains of what had been given to the relations with the children as above stated, and if the son or sons have acquired a competent age to administer what remains, they then take and possess the same without dividing it until they marry, when they divide it equally among themselves, together with the profits acquired thereon; but if they make a division immediately on taking possession of what remains, so that each possesses his share separately, then they are not obliged to share with each other what each has acquired.

But should there remain nothing of the mother's property and of the half of the acquired property during marriage, the sons, whether young men or married, must do as well as they can until their father dies; for these sons by the former marriage cannot claim anything from this their father.

If such a father has by his second wife a child or children, and among them a son or sons (for it is unnecessary to say anything further concerning daughters), and dies, his property which exists is divided into two equal shares, one of which the son or sons by the first wife take and the other the son or sons by the second wife, although there should be but one son of the first and five or six of the second. And what remains of the half of the acquired property during the first marriage must also devolve to the son or sons of that marriage, but if any part thereof has been diminished during the second marriage, then the sons of this marriage are obliged to make good the deficiency to the sons of the first marriage in the manner above stated, and the son or sons of the second marriage divide the property acquired during that marriage, and also the remaining part of that which has not been given as a dowry to the sisters (but not before their mother is dead); in which case the sons are obliged to pay all the debts contracted by the father during his marriage with their mother.

OF THE DIVISION OF PROPERTY WHERE ORPHAN
CHILDREN ARE LEFT.

12. If the father and mother die without being married more than once, and their surviving children are infants under age, then the relations of both sides assemble to consult to whose care the children are to be entrusted; and a person being chosen, the children are delivered to him together with the whole of the property left by the parents, which remains with such persons until they attain a competent age to marry; and when they are grown up it is to be supposed that it will be the turn of the eldest first to marry, when the friends must again assemble to consult, what part of his or her parents property shall be given to him or her as dowry, with which he or she must be content. In order to understand the following observations better, we will limit the number of brothers and sisters remaining unmarried to *three*- that is to say, two brothers and one sister-which last, on account of some misfortune or other, remains unmarried. If the brothers (having attained in the meantime a competent age) marry, and if she desires that the remaining property of her parents shall be divided, the relations and possessors thereof may not refuse it; but the brothers must in

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such case allow their sister who remains unmarried to have a larger share. This, however, the brothers often oppose, particularly when there is but little, because when the unmarried sister dies the married one succeeds to all that the unmarried one was possessed of.

But should it happen that both the brothers after they have grown up and are married possess the before-mentioned property without having divided it, and that the unmarried sister receives nothing else besides what is necessary to provide herself with subsistence and clothing until her death, in such a case the whole of the property remains with the brothers, and the married sister has no right or claim thereto: and should it happen that the unmarried sister had allowed herself to be deflowered and thereby had a child, she (in order to bring it up decently) ought to agree with the brothers and sister to divide the estate of their parents, in order to enable her to allot her child a certain portion thereof.

DIVISION OF PROPERTY WHERE THERE ARE HALF BROTHERS AND SISTERS

13. With respect to the succession of half-brothers and sisters, if a woman who has been married twice, and by the first husband has had a son and by the second a son and daughter, and these all survive their parents and act with their parents' estate as is above-mentioned and if the question is, Who shall inherit the deceased's estate? (respecting which the principal Mutaliyars and inhabitants have not agreed) many are of opinion that the full-sister must be preferred above the half-brother, but this would be quite contrary to the old-established laws. Therefore, I agree in opinion with the greatest part of the inhabitants who have been consulted on the subject, that the half-brother from the side he is brother - that is to say, from the mother's side - must succeed to the inheritance, and the sister, because there cannot be brothers from the father's side, must succeed to all that is come from the father's side, and the acquired property must be divided half and half between the half-brother and full-sister, provided that has been acquired by means of the mutual property.

DIVISION OF PROPERTY WHERE THERE IS ISSUE OF BOTH MARRIAGES

14. If the husband has been married twice, and has by his first wife had a son and daughter, and only one daughter by his second wife, and if the daughters have been married and received a dowry, and the father dies, it would be supposed, from what has been stated, that the son must succeed to the estate of the deceased; but in this case it may not take place, for the daughter of the second marriage must inherit equally with her brother, there being no full-brother to inherit. If a man has a child or children and his brother and sister die before or after him without children, then this man's son succeeds both to his brother's and sister's property as well as to that of his deceased father.

It is the same with a woman who has a child or children, and whose brother or sister dies afterwards without leaving children for this woman's daughter or daughters inherits both from the brother and sister of her or their deceased mother; but if the said brother and sister die first, and if the mother of the before-mentioned daughter is still alive, then the mother inherits from the brother and sister, whereby the daughters remain deprived of that inheritance, for when the mother afterwards dies her son or sons are justly entitled to all that their mother leaves at her death.

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DIVISION OF PROPERTY WHERE TWO PERSONS, EACH BEING THE SOLE CHILD OF THEIR RESPECTIVE PARENTS DIE WITHOUT ISSUE

15. In the case of two married persons, each in particular being the sole child of their respective parents, all that the mutual parents possessed must be brought together; and if the husband dies without leaving a child or children, then the property which proceeded from the father returns to the father's nearest relations, and to his mother's nearest relations, all her dowry which he inherited and of the acquired property and debts, each a fourth part. The same usage obtains, as it respects her, for all that she inherited from the father returns to the father's nearest relations, and her mother's dowry to the mother's nearest relations, and of the all her dowry which he inherited and of the father's nearest relations, and her mother's dowry to the mother's nearest relations, and of the acquired property and debts to each a fourth part, excepting that the gold and silver made for the husband's use goes reciprocally to his own father and to his mother's relations, and all that was made for the wife's use and worn by her goes to her relations, although there should be one the one side the value only of ten rix-dollars and on the other the value of one hundred rix-dollars.

Having thus stated what is to be done with the property when a husband and wife die, one after the other, without leaving a child or children, it is now necessary that we show, in case one of them dies, what the heirs ought to do to prevent all difficulties and losses. They must cause the survivor to return what was brought in marriage by the deceased, and also the half of the acquired property, they being justly entitled thereto; but if from motives of affection or otherwise the heirs wish to leave the survivor in the possession of any part of the inheritance, they must do it in writing. If they neglect to do this, they must when the survivor marries again, take back the property left in his or her possession. But if they do not do this also, and if he or she, having children by the second marriage, dies, in such case the heirs who have suffered so many years to elapse without claiming the property as are established by the laws of the country remain deprived thereof. With respect to the crops that have been gathered, when one of them has died, disputes have often risen, one pretending that so much was produced from the hereditary lands, while the other pretends that so much was produced from the hereditary lands, but no attention is paid to such claims, for all kinds of grains collected are considered as acquired property, which they really are, and as such are divided equally.

Should any of the man's hereditary property or women's dowry be diminished during marriage, when one of them dies and the property is divided the same must be made good from the acquired property, if it be sufficient; if not, he or she who suffers the loss must put up with it patiently.

PROPERTY HOW TO BE DIVIDED WHERE IT HAS BEEN IMPROVED.

16. Should husband and wife during marriage considerably improve a piece of ground. whether it be husband's hereditary property or wife's dowry-for instance, by building house, digging wells, and planting all sorts of fruit-bearing trees thereon-the heirs of the wife, should she die first, and should the improved ground be the husband's hereditary property shall not be at liberty to claim any remuneration for the expenses made. In the like manner also the husband's heirs cannot claim any remuneration should the wife's dowry ground have been improved.

HOW WHEN A PAGAN MARRIES A CHRISTIAN WOMAN

17. If a Pagan comes from the Coast or elsewhere and settles himself here, and being afterwards inclined to marry a Christian woman procure himself to be instructed in the Christian doctrine, and being sufficiently instructed is at last baptized and married, and by

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his industry acquires property by means of what his wife has brought in marriage, his heirs (should he die afterwards without leaving a child or children) shall not be entitled to anything: for not having brought anything in marriage they consequently shall not carry anything out, and being moreover Pagans. But should the wife die first without leaving any child or children, the husband is lawfully entitled to the half of the acquired property, it having been gained by his industry.

HOW WHERE TWO PAGANS INTERMARRY.

If a Pagan comes here as just stated and marries a Pagan woman, and such pagan dies without leaving a child or children, his relations inherit the half of the property acquired during marriage, because should he have left any child or children, and should they or his relations claim the inheritance they certainly would get it without his having brought anything in marriage they being Pagans; but having once embraced the Christian religion the Pagan's relations are not entitled to anything. Pagans consider as their lawful wife or wives those around whose neck they bound the taly with the usual Pagan ceremonies: and should they have more women, they consider them as concubines. If the wives, although they should be three or four in number, should all and each of them have a child or children, such children inherit, share and share alike, the father's property; but the child or children by the concubines do not inherit anything.

PART II

OF ADOPTION.

1. Ceremonies of adoption.
2. Of the succession to, and division of, property, in the case of adoption, where the parties adopting leave other children.
3. Where the adopted person dies without issue.
4. Where two children, not related, are adopted.
5. Of the division of property among adopted children, to the adoption of whom some of the relatives of the person adopting consent, while others refuse their consent.
6. where one of three brothers adopts a child.
7. of the adoption of a person of a higher or lower caste.

CEREMONIES OF ADOPTION.

1. If a man and women take another person's child to bring up, and both or one of them being inclined to make such child their heir, they must first ask the consent of their brothers and sisters, if there be any; if not, that of their nearest relations who otherwise would succeed to the inheritance; and if they consent thereto, saffron water must be given to the women or to the person who wishes to institute such a child their heir, to drink in the presence of the said brothers or sisters or nearest relations, and also in the presence of the witnesses. after the brothers and sisters or nearest relations, and also the parents of the child, shall previously have dipped their fingers in the water as a mark of consent. Although there be other witnesses, it is nevertheless the duty of the barbers and washermen to be present on such occasions.

If the brothers and sisters refuse to give their child, such a man and woman may take the child of another person, although a stranger, but they are not at liberty to drink saffron water without the consent of their brothers and sister or of those who conceive themselves to be heirs; although this litigious people, from mere motives of hatred, often endeavour to

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prevent a man and woman who have brought up child with the same love and tenderness as their own from adopting such child. Nevertheless, according to the testimony of all the Mutaliyars, such a man and woman may, in spite of the opposition, adopt such a child and bequeath it one-tenth part of the husband's hereditary or wife's dowry property; out of the acquired property they may bequeath more than one-tenth, provided they have not many debts. But such an adoption may not be made without the consent of the Magistrate, in order to keep them within the bounds of discretion, and also in order to prevent them from adopting children from motives of hatred towards their relations.

OF THE SUCCESSION TO AND DIVISION OF PROPERTY IN THE CASE OF ADOPTION WHERE THE PARTIES ADOPTING LEAVE OTHER CHILDREN.

2. But when the said man and woman both together drunk saffron water, such or such a child shall inherit all that they leave when they die; and if after such adoption, they have a child or children of their own, then such adopted child inherits together with the lawful child or children. and it is to be observed that such an adopted child, being thus brought up and instituted an heir, loses all claim to the inheritance of his own parents, as he is no longer considered to belong to that family, so that he may not inherit from them. If the adopting father alone drinks saffron water then such a child shall succeed to the inheritance of his or her own mother; and if the adopting mothers has along drunk saffron water without her husband, then such a child inherits also from his or her own father.

WHERE THE ADOPTED PERSON DIES WITHOUT ISSUE

3. If such an adopted person dies without leaving a child or children, then all that he or she might have inherited returns to the person or persons from whom it came, or to their heirs.

WHERE TWO CHILDREN NOT RELATED ARE ADOPTED

4. If a husband and wife adopted two children, a boy and a girl who are not related to one another by blood, so that they can marry together, and if both husband and wife together drink saffron water in manner above stated, and if both the said adopted persons be married together after they arrive to the age of maturity, and at the expiration of time one of them dies without leaving a child or children, then the survivor inherits the whole on account of the adoption which binds them as brothers and sisters, and not in the blood. It goes in the same manner if husband and wife, after having adopted the boy, have a daughter of their own. Such a boy is allowed to marry with the daughter, provided they are not nearer related by blood than brothers and sisters children, and they inherit from one another as before mentioned

DIVISION OF PROPERTY AMONG ADOPTED CHILDREN, TO THE ADOPTION OF WHOM SOME OF THE RELATIONS OF THE PERSON ADOPTING CONSENT, WHILE OTHERS REFUSE THEIR CONSENT.

5. If a husband and a wife wish to adopt another person's child to which adoption some of his or her brothers and sisters or nearest relations consent, and others do not consent, in such case the husband and wife are at liberty to adopt such a child, and to make him the heir to so much as the share amounts to of those who have consented to the adoption, and who, as a token thereof, must have dipped their fingers in the saffron water

drunk by the husband and wife, leaving the inheritance to which the non-consenting party is entitled at their disposal, until such a time as husband and wife, or one of them dies, when the child and each of them take the shares to which they are entitled. But if the said heirs, either through negligence or otherwise, permit or allow the adopted person to remain for several years in the peaceable possession of the property, the heirs by their silence forfeit their claim and title thereto.

WHERE ONE OF THREE BROTHERS ADOPTS A CHILD.

6. If there are three brothers, one of whom has two children and the other two have none, and if one of these wishes, from pure motives of affections to adopt one of his brother's children, which the other brother who has also no children wishes to approve,* the two brothers may carry their design into execution, leaving to the third brother the action which he pretends to have on the inheritance. On the death of such adopting brother all his property is divided between the adopted child and the non-consenting brother, share and share alike. If the non-consenting brother, who has no children, wishes to give some of his property to the child who has remained with the father unadopted, the question is, whether the adopted child can prevent it? The general opinion now is that on account of the right which he had thereto (as nephew and heir of his uncle) being lost by the adoption, he must allow the giver to do with his property what he pleases as long as he lives.

OF THE ADOPTION OF A PERSON OF A HIGHER OR LOWER CASTE

7. If a man adopts in the manner above stated a youth of a higher or lower caste than his own, such child not only inherits his property, but immediately goes over into his adopted father's caste, whether it be higher or lower than his own. But if a woman adopts a child, such child cannot go over her caste, but remains in the caste of his own father, and will only inherit the woman's property after death.

If a man adopts a girl of another caste in the manner above stated *she* (it is true) goes over into the caste of her adopted father, but not her children or descendants: for if she marries and has a child or children, they follow their father, except among slaves, which case it has another tendency, for there the fruit follows the womb.

PART III

OF THE POSSESSION OF GROUNDS AND GARDENS, & C.

1. Of joint possession or tenancy in common.
2. Of the renting of ground.
3. Division of produce where fruit trees overhang the ground of another.
4. To whom the possession of palmyra trees belongs.

OF JOINT POSSESSION OR TENANCY IN COMMON.

1. If two or more persons possess together a piece of ground without having divided it, and one of them incloses with a fence as much as he thinks he would be entitled to on a divided and plants therein coconut and other fruit-bearing trees, and the other shareholders do not expend or do anything to their share of the ground until the industrious one begins to reap the fruits of his labour, when the others, either from covetousness or to plague and disturb, come (which is frequently the case among the Tamils) and want to have a share in the profits without ever considering that their laws and customs clearly adjudge such fruits to the person who has acquired them by his labour and industry—when in such a case (not being able to obtain the fruits) they generally, request to divide the ground to know what belongs to each person, such division may not be refused. But care must be taken in making it that the part which has been so planted falls to the share of the brother who planted the same, and that the unplanted part falls to the share of the other joint proprietors; unless they wish to put off the repartition of the ground and give one another time to plant an equal number of trees, and by proper attention to get them to bear fruit, in which case the repartition must be general without considering who has planted the ground.

OF THE RENTING OF GROUND

2. If a person has not a proper piece of ground of his own on which to plant coconut trees, and is allowed to do it on another man's ground, he gets two-thirds of the fruits which the trees planted by him produce, provided that he himself furnished the plants, and the owner of the ground receives the other third; but if the owner of the ground supplies the plants, the planter gets but a third and the owner of the ground the other two-thirds; if, however, they have *both* been at an equal expense for the plants, then they are each entitled to an equal share of the fruit and trees. This division mostly takes place in the province of Tinmarádchi, for in the other provinces they know better how to employ their grounds than to let strangers plant coconut trees thereon. If a labourer squeezes out his *panankáys* and sows the kernels in order to obtain plants, and on digging them out forgets some of them, which afterwards become full-grown trees bearing fruit, the fruit which they produce remains the property of the owner of the ground, the trees having grown of themselves without any trouble (such as watering them) having been taken.

DIVISION OF PRODUCE WHERE FRUIT TREES OVERHANG THE GROUND OF ANOTHER

3. If any one plants on his ground near the boundaries thereof any fruit-bearing trees which must be cultivated with a great deal of trouble, and of by a crooked growth the tree or any of the branches grow on or over the neighbour's grounds, the fruits of such tree nevertheless remain the entire property of the planter, without his neighbour having any right to claim the fruit of the branches which hang over his ground; but if any trees, such as tamarinds, illupai, and margosa, grow of themselves without having been planted or any trouble having been taken, in such case the fruit belongs to the person whose ground they overshadow.

It seems that many customs have been invented here for the sole purpose of plaguing one another: for it is sufficient to say that the trees which stand on a person's own ground have grown up of themselves without trouble or labour, and that he is not to be the owner of the branches and fruit which grow over his neighbour's ground, the fruit of such branches being indisputably his; and he is even at liberty to cut the branches, if they hinder him and sell the same for his own profit without the consent of the owner of the ground on

* The Tamil version in Mutukishna's Tesawalamai reads "even though the other brother who has also no children does not approve."

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which the trees stand. And the owner of the branches cannot also prevent the owner of the tree from cutting it down, but in such a case he must give the branches to the person over whose ground they hang. But, on account of the margosa oil, it has been ordered, since the Company has had possession of the country, that the trees are not to be cut down without the special consent of the person in power; and it is the same with all other fruit-bearing trees.

TO WHOM THE POSSESSION OF PALMYRA TREE BELONGS.

4. Although a piece of ground belongs to one and the old palmyra trees standing thereon belong to another person, the owner of such trees cannot claim the young trees, as they must remain to the possessor of the ground, excepting in the village of Aráli, where it is an ancient custom that the owner of the old trees takes possession of the young trees, which is the reason why only a few young trees are found in that village. For although a few ripe *pán2an2káy*s fall occasionally from the trees upon the grounds from which young plants proceed, the owner of the ground, when he wants to cultivate it, has a right to extirpate such plants in order to get rid of other persons' trees on his ground.

In the province of Ten2marád2chi and Pachchilaippalli, in so far as the trees and not the ground stand mentioned in the Company's Tompu, the owners of the old trees take the young ones; but where the grounds are mentioned and also the young trees, and for which rent is paid, then the young palmyra trees belong to the owners if the grounds.

PART IV.

OF A GIFT OR DONATION.

1. In what cases a gift may or may not be made where husband and wife live separately.
2. How for they may make donation to their nephews and nieces.
3. When they received a gift of land from another person.
4. How far gift to one of two sons are good.
5. Present to sons, being bachelors, by relations, remain to them on their marriage, but no other presents.

IN WHAT CASES A GIFT MAY OR MAY NOT BE MADE WHERE HUSBAND AND WIFE LIVE SEPARATELY.

1. When husband and wife live separately on account of some difference, it is generally seen that the children take the part of the mother and remain with her. In such a case the husband is not at liberty to give any part whatsoever of the wife's dowry away; but if they live peaceably he may give some part of the wife's dowry away. And if the husband on his said wishes to give away any part of his hereditary property which he has brought in marriage, he may then give away one-tenth of it without the consent of the wife and children, and no more; but the wife, being subject to the will of her husband, may not give anything away without the consent of her husband.

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HOW FAR THEY MAY MAKE DONATION TO THEIR NEPHEWS AND NIECES.

2. If the husband and wife have no children, and are therefore desirous to give away some of their goods to their nephews and nieces or others, it cannot be done without the consent of the mutual relations, and if they will not consent to it they may not give away any more of their dereditary property and dowry, and if their debts be not many, they may also give something from the property acquired during their marriage. If those nephews and nieces who have received such donations die without issue, then the brothers inherit from brothers and sisters from sisters, and the children and grandchildren succeed also if there be any; if not, it devolves to the parents of those who obtained the donation, that is to say, to their father's said and to his brother and his children, and in like manner on their mother's said to her sister and her daughter, and on failure of them to the brothers and their children; and in default of heirs on his or her said the gift returns to the donor and his nearest heirs.

WHEN THEY RECEIVE A GIFT OF LAND FROM ANOTHER PERSON

3. If a husband or his wife receives a present or gift of a garden from another person, so much gift or present as is inexistence on the death of one of them, when the property is divided, remains to the said of the husband or wife to whom the present was made, without any compensation being claimable for any part of the gift that may have been alienated; but the proceed thereof acquired during marriage must be added to the acquired property. But if any one has a present of a slave, cow, sheep, or anything else that may be increased by procreation, such present, together with what has been procreated, remains to the side where it was given, without any compensation being claimable or what might have been sold or alienated thereof.

HOW FAR GIFT TO ONE OF TWO SONS ARE GOOD.

4. If a husband and wife have two sons and no daughters, and the husband, from a greater affection which he bears the eldest son more than the youngest, wishes to give him a part of his hereditary property, he may do it by executing a regular deed; and if, after the expiration of some time, the youngest son dies without issue, and afterwards the parents die one after the other, then it will be as if the gift never had been made, for everything devolves to him who received the gift; and if he dies also without issue his property is inherited in the manner above stated. The father's hereditary property and the half of the acquired property, after deducting therefrom the debts, go to his brother or brothers, and the mother's dowry property and the other half of the acquired property (after deducting also therefrom the half of the debts) go to his sister or sisters, without the latter being at liberty to claim anything on account of what the father gave to his son as above stated. The same also obtains if the grant or gift had been made on the mother's said; but if the gift has been obtained from any other person besides the father and mother, then it is divided both on the father's and on the mother's said.

If husband and wife have two, three, or more sons, and have given and delivered to them apiece of ground or garden, and if, after having possessed it for several years, the father and mother die, which causes a division of the estate, and if the above-mentioned son who has obtained the grant or gift demands that it shall be first delivered him from the estate, it may not be refused to him if he can prove it by a written document; if not, the gift is considered of no value, and is equally divided.

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PRESENTS TO SONS, BEING BACHELORS BY RELATIONS, REMAIN TO THEM ON THEIR MARRIAGE, BUT NO OTHER PRESENTS.

5. We have states above that all the property acquired by the son or sons while they are bachelors must be left by them to the common estate when they marry; but this is by no means understood to include the presents that have been made them by relations or others or others, which must remain to the persons to whom they have been given.

Should a husband and wife who have no children have acquired during their marriage any property, and should the husband, without the knowledge of his wife, give a part thereof to his heirs, and both afterwards die, in such case on the division of the estate the relations of the wife must receive beforehand a part equal to that which was given away by the husband to his relations when he was alive.

PART V

OF MORTGAGES AND PAWNS.

1. Of mortgages of lands, on condition that the mortgagee should possess the same, and take the profit thereof in lieu of money.
2. Mortgagee so in possession to be liable to all land taxes or duties.
3. Of redemption of a mortgage where due notice has not been given by the mortgagor.
4. Of mortgages for certain terms of years.
5. Of mortgages of fruit trees.
6. Of mortgages of slaves.
7. Of loans of money for the use beasts.
8. Of pawns of jewels, &c.

OF MORTGAGE OF LANDS, ON CONDITION THAT THE MORTGAGEE SHOULD POSSESS THE SAME AND TAKE THE PROFIT THEREOF IN LIEU OF MONEY.

1. When any person has mortgages his lands or gardens to another for a certain sum of money, upon condition that such lands or gardens be possessed by the mortgagee, and that the profit thereof should be enjoyed by him instead of the interest of his money, then the mortgagor of such lands or gardens cannot redeem the same whenever he pleases, but after the crop has been reaped he must give information of his intention to the mortgagee so as to prevent any further trouble, labour, and expense to the latter. In such case the mortgagor must, without failure, pay to the mortgagee the sum of money for which the said property has been mortgaged, namely, for the varaku land in the months of July and August, and for the paddy lands in the months of August and September; but should the mortgagee have left the ground for the space of one year without sowing, for the purpose of having a better crop, in that case the mortgagor will be obliged to pay the money for which the grounds have been mortgaged in the month of November in the same year, and in the month of November also must be redeemed the palmyra, betel, and tobacco gardens. Yet should the mortgagee conceive a dislike to the land or garden mortgaged to him on account of the same not yielding much profit as the interest of money for which the lands

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have been mortgaged, and should therefore wish to get rid of the same and to recover his money, he shall be obliged in that case to wait for his money one year after the lands or gardens have been delivered to the proprietor or the mortgagor; and if the mortgagor is and remains unable to redeem such land or garden, in that case the same must be offered for sale to his heirs, who than may purchase such lands or gardens in case the same are worth more than the amount for which they were mortgaged, but should they not be worth so much the mortgagee must than accept and keep the same for the sum advanced by him, provided he is confirmed in the full possession thereof by a title deed drawn up in proper form.

MORTGAGEE SO IN POSSESSION TO BE LIABLE TO ALL LAND TAXES OR DUTIES

2. The mortgagee is to pay all taxes ad land duties to which the mortgaged land is subject, so long as he remains in the possession of the same, even for that year in which the mortgaged land is redeemed, for the payment of which taxes and duties the mortgagee must take a receipt from some person belonging to the Kachcheri, except in the Vadamarádchi, where the custom differs, because there the proprietor receives, a tenth part of the fruit produced by the ground mortgaged by him, and he therefore pays the land duties and takes a receipt for the same in his own name; and for the palmyra trees he received the duties upon the trees from the mortgagee or possessor, which duties he, as mortgagor, then pays to the Majorals and takes a receipt for the payment thereof in his own name.

OF REDEMPTION OF A MORTGAGE WHERE DUE NOTICE HAS NOT BEEN GIVEN BY THE MORTGAGOR.

3. In case the mortgagor wishes to redeem his mortgaged ground, but out of ignorance informs the mortgagee too late of his intention, namely, after the ground has been dug or other labour has been bestowed on it, in that case the redeemer must give to the mortgagee his proper share from the fruit which the land has produced in that year for the labour and expenses which he has bestowed upon such lands; in such case the redeemer must observe the customs prevailing in the province and village.

Yet when the mortgagee received the money advanced by him, but cannot agree with the proprietor with respect to the profits expected by him according to the custom of the country, the proprietor in that case must permit the mortgagee himself to sow that piece of land, provided that he gives to the proprietor of the land, according to the custom of the country the taraiváram. That is, the ground duty.

OF MORTGAGES FOR CERTAIN TERMS OF YEARS.

4. At present it is the prevailing custom here that many persons mortgage their lands for a fixed term of three, five, eight, or than years; yet, in case the mortgagor before the expiration of the stipulated time shall be compelled to sell a piece of mortgaged land either for the purpose of discharging his debts or for some other reasons, the mortgagee cannot prohibit such a sale, but must consent to it and receive or accept the sum of money advanced by him according to the custom of the country.

OF MORTGAGES OF FRUIT TREES.

5. If any person has mortgaged to another, in the manner abovementioned, any fruit-bearing trees, namely, coconut, mango, jak, or areca trees, and is able to redeem the same, he must do so in the months of December or January; and the mortgagee may pluck such ripe fruit as are eatable from the said trees before he delivers over the same to the proprietor.

* Section 6 mortgages of sales omitted.

OF LOANS OF MONEY FOR THE USE OF BEASTS.

7. Should any person lend a sum of money to another upon condition that the debtor, instead of paying the interest, should furnish the lender with one or more beasts for the purpose, of having his land ploughed, without mentioning, however, what buffaloes or bullocks are to be delivered by him during the period that he keeps the borrowed money under him, and should a beast or beasts so delivered to be used in ploughing the land happen to die during the said period, the debtor or the proprietor of such beast or beasts is those is obliged to furnish the lender of the money with one or more beasts instead of those which are dead, in order to be kept by the lender of such sums of money until his land has been ploughed, after which the borrower of the money may acute himself from the said obligation by returning such sums of money as were borrowed by him.

OF PAWNS AND JEWELS, &c.

8. Should any person take in pawn any jewels or wrought gold or silver for a certain sum of money in order received a monthly interest upon the same, and should the proprietor of the pawned goods be able to prove that the pawnee has either worn them himself or has lent out the same to be worn by others, the pawnee in such case will forfeit the interest of the sum of money lent by him, and such paw pawnee will forfeit the interest of the sum of money lent by him, and such pawnee will be obliged in such case to return the pawn for such an amount as was lent by him to the pawnor.

PART VI.

OF HIRE.

OF THIS HIRE OF BEASTS.

When any person has hired one more beasts in order to plough his land, the proprietor of such beasts is not obliged to furnish the person who has hired the same with fresh beasts in case such as were hired become sick or happen to die during the time that they were used to plough the land. In case any person borrows from another any beasts for his use with the free consent of the proprietor, such proprietor, according to the custom of the country, may not demand from the borrower any indemnification for such of the beasts as are hurt or have broken their legs, but must consider the loss as accidental and consequently bear the same.

PART VII.

OF PURCHASE AND SALES.

1. Of sales of land.
2. Of sales of cattle.
3. Of the of children.

OF SALES OF LANDS.*

1. Formerly, when any person had sold a piece of land, garden, or slave, &c., to a

stranger without having given previous notice thereof to his heirs or partners, and to such of this neighbours whose grounds are adjacent to his land, and who might have the same in mortgage, should they have been mortgaged, such heirs, partners, and neighbours were at liberty to claim or demand the preference of becoming the proprietors of such lands.

The previous notice which was to be given persons of the above description was to be observed in the following manner, namely to such as resided at the village, one month; to persons residing in the same province but out of the village, three month; to those residing in another province, six months; and to those who reside abroad, one year.

The above periods having expired without such persons having taken any step upon the information given to them, the sale was considered valid; yet this mode of selling lands underwent a alteration afterwards in consequence of the good orders given on that subject during the time of the old Commander Bloom (of blessed memory), as since those orders no sale of lands whatever has taken place until the intentions of such as wish to sell the same have been published on three successive Sundays at the church to which they belong during which period such persons as mean to have the preference to the lands for sale according to the ancient customs of the country are to come forward and to state the nature of their preference in consequence whereof they then become the purchasers of the same.

It is customary under this nation that a piece of land which has been mortgaged to one person is sold to another, for which sale, according to the above-cited order title deeds are granted, although the new purchaser is unable to discharge the amount of the purchase-money, and in consequence thereof pays immediately to the seller only that part of the purchase-money which exceeds the sum for which the land has been mortgaged land afterwards leaves the same in possession of the former mortgagee for the amount for which it was mortgaged by the former proprietor, until the new purchaser has the means to pay the amount for which the said land has been mortgaged. This manner of dealing creates many disputes, as it occurs very often that such sums of money are not discharged before the expiration of eight, nine, or ten and more years, on which account I am of opinion (yet submitting mine to wiser judgment) that the passing of title deeds without the purchase amount being fully discharged should be prohibited or at least that orders should be given that in cases of the above-described nature the mortgage deed made previously in the name of the seller should be repealed, and that a new one should be passed in the name of the purchaser instead of that which has been repealed.

OF SALES OF CATTLE.

2. If any person wishes to sell cattle, namely, bullock, cows, buffaloes, sheep, &c., he sales thereof are to take place without any application or acts in writing, which sales are considered valid when the dry dung or excrement of such animals as were sold has been delivered by the seller to the purchaser; and in case the animals so sold happen to die or to get young ones before they are delivered up, the purchaser being able to prove by witnesses that seller has sold them to him for a sum of money, and that the dry dung or excrement of those animals has been received in token of their having been sold, obtains the right of a proprietor of such animals as were purchased by him as well as of their young ones, without any claim whatever being made to them by any other person whomsoever, or any compensation for loss in case of death.

Should any person sell any of his bullocks or buffaloes, &c., upon a statement that they are fit to be employed in ploughing lands, and should the contrary appear to be the case after the price has been agreed upon and paid for them, the purchaser may in such case, within the period of fifteen days, deliver back to the seller such of the above-described animals, and may demand from him the price paid for the same, who in that case is also obliged to restore it to the purchaser.

* So much of the Thesawalamai as requires publication and schedule of intended sales or other alienations of immovable property is repealed by 4 of 1895.

Should any person sell a cow or a she-buffalo to another stating that the animal sold has once or several times had young ones, and should it appear afterwards that the animal sold upon the above statement instead of having had young ones or several times, is a cow which never bears a calf, and consequently unfit for generation, the purchaser may in that case deliver back to the seller the cow or such other animals as were purchased by him, and he may demand from the seller the restoration of the purchase money. But should any person, on the contrary, purchase a calf a year and a half or two years old, and should it appear afterwards that the calf so purchased grows up a cow which never bears a calf, or is unfit for generation, the purchaser is then obliged to keep the same, as no fraud whatever could have taken place in the sale thereof.

PART IX.

OF LOANS OF MONEY UPON INTEREST.

1. Of loans for fixed terms.
2. Securities how far liable for debt.
3. Wife or children how far liable for husband's debts.
4. Interest not to exceed the principal.
5. Of loans of paddy.
6. Of exchanges of paddy, &c.
7. What proportion of profits is to be paid where any person sows the grounds of another without stipulating any fixed portion of the produce.

OF LOANS FOR FIXED TERMS.

1. When any person lends a sum of money upon interest to another upon condition that the borrowed sum should be restored within the time fixed by the lender, with such interest as was usually paid to others at the time that the money was lent by him, should such conditions not be fulfilled by the debtor, the creditor in that case must cause the pawn to be sold, if he has had the prudence to take any lands or any other goods whatever in pawn; and in case the debtor does not consent to the said pawns being sold, the lender of such sums of money must prefer his complaint to Government and request from the same that such mortgages goods be sold for his benefit.

SECURITIES HOW FAR LIABLE FOR DEBT.

2. Should there be securities and should the debtor or borrower abscond or be in reduced circumstances and unable to discharge the debt contracted by him, the creditor may then demand the payment of such debt from the securities, who in such case are obliged to discharge the right of instituting an action against the debtor should the latter be improved in circumstances. If two persons jointly borrow a sum of money from another and bind themselves generally for the amount borrowed, the lender in that case may demand the payment of the amount so lent from such a debtor as he may happen to see first, provided that the following expressions are inserted in the *alai*, or bond, namely, *Munninran munnirukka*, which signifies, "He who is present or before me must pay the whole debt"; the consequence whereof then is that the debtor who, comes first before the creditor, when he intends to demand the money, must pay the whole debt; but such a debtor who pays the

whole debt has a right to demand the payment of half the amount paid by him from his fellow-debtor wherever he find him.

WIFE OR CHILDREN HOW FAR LIABLE FOR HUSBAND'S DEBTS

3. When a man has contracted debts in his lifetime without the knowledge either of his wife, child, or children, and happens to depart this life before he has discharged the same, his wife, child, or children, are obliged to pay such debts, provided the same be duly proved.

When husband and wife jointly cause a piece of land or a garden to be registered as a pawn for a sum of money borrowed by them, and do not deliver over such land or garden to the creditor, but keep these in their own possession, and in consequence thereof give them afterwards to any of their daughters as a dowry without specifying in the deed of gift that such a piece of land or garden has been mortgaged to another-if the debtors in the supposed case happen to depart this life without discharging a debt of the above nature, yet leaving behind some other goods-their creditors of the above description, who have neglected to prevent such mortgaged lands or garden from being given as a dowry, have a right to seize such other goods as might have been left behind by the debtors; and the son or sons of such debtors are responsible for such debts, provided that the creditors (if such son or sons are unable to discharge the debt) do wait until they are in better circumstances.

INTEREST NOT TO EXCEED THE PRINCIPAL.

4. When a person lends money upon interest and suffers the interest to exceed the principal, the debtor is not obliged to pay the interest exceeding such principal.

OF LOANS OF PADDY.

5. When a person lends money on condition to receive paddy on account of interest, he loses the interest when the harvest fails; and in the event of a bad harvest the interest is to be calculated and paid according to the profits of that harvest.

When any person is in want of paddy either as seed corn or for any other purpose, and borrows paddy to pay interest in kind, the borrower must stipulate the quantity which he agrees to pay, because it is not known what quantity is customary to be paid on such occasion, on which account the creditors take from two to five *parais* upon a quantity of then *parais* of paddy; and the mode to be observed in paying paddy on account of interest is that just stated in the event of a bad harvest or of no harvest having taken place. In case the debtor has had a good harvest every year during the time that he keeps the borrowed money, and the creditor has neglected to come and demand his interest upon the harvest, the debtor is not obliged in that case to pay anything on account of interest exceeding the principal, but it is sufficient if he pays double the principal sum borrowed by him.

OF EXCHANGES OF PADDY, & C.

6. In case any person wishes to exchange grain, paddy, *chami*, *kurakkan*, *kollu*,* rice, and *cadjan* must be exchanged for an equal quantity, because they bear the same price; but

* Section 3 of Part VII. and Part VIII. omitted.

* An old Tamil version has, "Peas and rice are exchanged for an equal quantity".

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any person wishing to exchange paddy for varaku must give one and a half parai of varaku for one parai of paddy.

WHAT PROPORTION OF PROFIT IS TO BE PAID WHERE
ANY PERSON SOWS THE GROUNDS OF ANOTHER
WITHOUT STIPULATING ANY FIXED PORTION
OF THE PRODUCE.

7. When any person sows the fields of another without a previous agreement what quantity the sower shall give from the harvest to the proprietor of the fields, it is deemed sufficient if the sower pays to the proprietor the taraiváram, which signifies the ground duty, and is calculated to be onethird part of the profits, except the tenth part, which is to be given to the proprietor previously. And when the sower has agreed to give a fixed quantity to the proprietor, and the crop happens to fail in the year for which the contract has been made, the sower need not pay to the proprietor the quantity agreed upon; but in case the other inhabitants of the village (in which such a sower resides) have all had a good harvest, than the sower of the above description is obliged to pay such a quantity to the proprietor as was agreed upon by him is, because in such an event the failure of the crop of the field sown by him is attributed to his laziness and negligence; yet should it happen that he has had a tolerably good harvest and the other inhabitants of his village a bad one, then the proprietor of the ground must be satisfied with the quantity produced by the field, and may not claim anything more from the sower.

The above laws and customs of Jaffnapatam were composed by me in consequence of my experience obtained by long residence and intercourse at that place. I have written the above laws and customs after a strict inquiry into the same by order of His Excellency the Governor and Doctor of Laws, Cornelis Joan Simons, and I hope my endeavours will satisfy His Excellency the Governor's intention; in the expectation whereof I have the honour to be,

Honourable Sir,
Your Excellency's most obedient, humble Servant,
(Sinned) CLASS ISSAKSZ.

Jaffnapatam, 30th January, 1707.

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APPENDIX III

CHAPTER 48.

MATRIMONIAL RIGHT AND INHERITANCE (JAFFNA).

Ordinance No. 1 of 1911

An Ordinance to amend the Law relating to the Matrimonial Rights of the Tamils who are now governed by the Tésawalamai with regard to Property and Law of Inheritance.

(17 July, 1911).

PART 1.

PRELIMINARY

Short title.

1. This Ordinance may be cited as the Jaffna Matrimonial Rights and Inheritance Ordinance.

Application of Ordinance.

2. This Ordinance shall apply only to those Tamils to whom the Tésawalamai applies.

Applicability of Tésawalamai to married women.

3. (1) Whenever a woman to whom the Tésawalamai applies married a man to whom the Tésawalamai does not apply, she shall not during the subsistence of the marriage be subject to the Tésawalamai.

(2) Wherever a woman to whom the Tésawalamai does not apply marries a man to whom the Tésawalamai does apply, she shall during the subsistence of the marriage be subject to the Tésawalamai.

PART II.

MATRIMONIAL RIGHT OF HUSBAND AND WIFE WITH
REFERENCE TO PROPERTY

Matrimonial right of spouses married before the Ordinance.

4. The respective matrimonial right any husband and wife with regard to property or states arising under or by virtue of any marriage solemnized before the commencement of this Ordinance, and all rights which any other person may have required or become entitled to under or by virtue of any such marriage, shall (except where hereinafter is otherwise expressly provided) be governed by such law as would have been applicable thereto if this Ordinance had not been passed.

Matrimonial right of those married after the Ordinance to be governed by the Ordinance.

5. The respective matrimonial right of every husband and wife married after the commencement of this Ordinance in, to or in respect of movable or immovable property shall,

during the subsistence of such marriage, be governed by the provision of this Ordinance.

Property of a wife acquired during or before marriage, except tediâtétam, to remain her separate property.

6. Any movable or immovable property to which any women married after the commencement of this Ordinance may be entitled at the time of her marriage, or except by way of tediâtétam as hereinafter defined, may become entitled during her marriage, shall, subject and without prejudice to the trusts of any will or settlement affecting the same, belong to the women for her separate estate, and shall not be liable for the debts or engagements of her husband, unless incurred for or in respect of the cultivation, upkeep, repairs, management, or improvement of such property, or for or in regard to any charges, rates, or taxes imposed by law in respect thereof, and her receipts alone or the receipts of her duly authorised agent shall be a good discharge for the rents, issues, and profits arising from or in respect of such property. Such women shall, subject and without prejudice to any such trusts as aforesaid, have as full power of disposing of and dealing with such property by any lawful act inter vivos without the consent of the husband in case of movables, or with his written consent in the case of immovables, but not otherwise, or by last will without consent, as if she were unmarried.

Property of husband acquired before or after marriage, except tediâtétam, to be his separate property.

7. Any moveable or immovable property to which any husband married after the commencement of this Ordinance may be entitled at the time of his marriage, or except by way of tediâtétam, may become entitled during his marriage, shall, subject and without prejudice to the trusts of any will or settlement affecting the same, belong to the husbands for his separate estate. Such husband shall, subject and without prejudice to any such trusts as aforesaid, have full power of disposing of and dealing with such property.

Power to district Court to supply consent in certain cases.

8. If in any case in which the consent of a husband is required by this Ordinance for the valued disposition of or dealing with any property by the wife, the wife shall be deserted by her husband or separated from him by mutual consent, or he shall have lain in prison under a sentence or order of any competent Court for a period exceeding two years, or if he shall be a lunatic or idiot, or his place of abode shall be unknown, or if his consent is unreasonably withheld, or the interest of the wife or children of the marriage require that such consent should be dispensed with, it shall be lawful for the wife to apply by petition to the District Court of the district in which she resides or in which the property is situated for an order authorising her to dispose of or deal with the property without her husband's consent; and such Court may, after summary inquiry into the truth of the petition, make such order, and that subject to such conditions and restrictions as the justice of the case may require, whereupon such consent shall, if so ordered and subject to the terms and conditions of such order, become no longer necessary for the valid disposition of or dealing with such property by such women. Every such petition shall require a stamp of ten rupees, but no further stamp duty shall be required for any legal proceeding under this section. Such order shall be subject to appeal to the Supreme Court:

Provided, however, that in any case where a separation a mensâ et thoro has been decreed by a competent Court, the consent of the husband shall not be necessary to enable the wife so separated to deal with or dispose of her property, The Summary inquiry prescribed by this section may be held by the district Judge in his private room if either party so required.

Power of husband or wife to make gifts to each other.

9. It shall be lawful for any husband or wife (whatever married before or after the commencement of this Ordinance), notwithstanding the relation of marriage, to make or join each other in making during the marriage any voluntary grant, gift, or settlement of any property, whether movable or immovable, to, upon, or in favour of the other; but, except jewels, personal ornaments, and wearing apparel suitable in respect of value to the wife's rank given to her by the husband, all property so granted, gifted, or settled, and all acquisitions made by a husband or wife out of or by means of the moneys or property of the other, shall be subject to the debts and engagement of each spouse in the same manner and to the same extent as if such grant, gift, settlement, or acquisition had not been made or had not occurred.

Power of District Court to settle disputes between husband and wife.

10. (1) If any question or dispute shall arise between any husband and wife (whether married before or after the commencement of this Ordinance) relative to any property declared by this Ordinance to be the separate property of the wife, either party may apply by motion in a summary way to the District Court of the district in which either party resides, and thereupon the District Judge may make such order, direct such inquiry, and award such costs as he shall think fit; and the District Judge may, if either party so require, hear the application in his private room.

(2) any order so made shall be subject to appeal to the Supreme Court.

(3) Every such motion shall require a stamp of ten rupees, but no further stamp duty shall be required for any other legal proceeding under this section.

Power to husband or wife to effect policy of insurance upon or her life.

11. A husband or wife (whether married before or after the commencement of this Ordinance) may after the commencement of this Ordinance effect a policy of insurance upon his or her own life or the life of his or her wife or husband, as the case may be, for his or her separate use; and the same and all benefits thereof if expressed on the face of it to be so effected shall enure accordingly, and the contract in such policy with a married woman shall be as valid as if made with an unmarried woman.

Effect of life insurance by husband in favour of wife children.

12. A policy of insurance, whether effected before or after the commencement of this Ordinance, by any married man (whether married before or after the commencement of this Ordinance), on his own life and expressed upon the face of it to be for the benefit of his wife or his wife and children or any of them, shall enure and may be deemed a trust for the benefit of his wife for her separate use and of his children or any of them according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or his creditors or form part of the estate:

Provided that if it shall be proved that the policy was effected and the premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premium so paid.

Married women having separate property to be liable to maintain her children Husband's liability not affected thereby.

13. A married woman having separate property adequate for the purpose shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children:

Provide that nothing in this Ordinance shall relieve her husband from any liability at present imposed upon him by law to maintain her children.

PART III.**INHERITANCE***Applicability of sections of this Part of the Ordinance.*

14. The following sections of this Ordinance shall apply to the estate if such persons only as shall die after the commencement of this Ordinance, and shall be then unmarried, or if married, shall have been married after the commencement of this Ordinance.

Mudusam or property devolving on death of ancestor.

15. Property devolving on a person by descent at the death of his or her parent or of any other ancestor in the ascending line is called mudusam (patrimonial inheritance).

Urumai or property on death of relative.

16. Property devolving on a person by descent at the death of a relative other than a parent or an ancestor in the ascending line is called urumai (non-patrimonial inheritance).

Property derived from the father's said.

17. Property received by any person in mudusam, or in urumai, or in dowry, or under a will as heir, or legatee, or in donation, or in a manner other than for pecuniary consideration from a father, or any of his ascendants, or any of his collateral relations, is said to be property derived from the father's said.

Property derived from the mother's said.

18. Property received in mudusam, or in urumai, or in dowry, or under a will as heir or legatee, or in donation, or in a manner other than for pecuniary consideration from a mother, or any of her ascendants, or any of her collateral relations, is said to be property derived from the mother's said.

Meaning of tediâtêtam.

19. The following property shall be known as the tediâtêtam of any husband or wife:-

- (a) property acquired for valuable consideration by either husband or wife during the subsistence of marriage;
- (b) profits arising during the subsistence of marriage from the property of and husband or wife.

Devolution of tediâtêtam

20. (1) The tediâtêtam of each spouse shall be property common to the two spouses, that is to say, although it is acquired by either spouse and detained in his or her name, both shall be equally entitled thereto.

(2) Subject to the provisions of the Tésawalamai relating to liability to be applied for payment or liquidation of debts contracted by the spouses or either of them on the death intestate of either spouse, one-half of this joint property shall remain the property of the survivor and the other half shall vest in the heirs of the deceased; and on the dissolution of a marriage or a separation a mensâ et thoro, each spouse shall take for his or her own separate use one-half of the joint property aforesaid.

Inheritance generally.

21. Subject to the right of the surviving spouse in the preceding section mentioned, the right of inheritance is divided in the following order as respects (a) descendants, (b) ascendants, (c) collaterals.

Right of children, grandchildren, and remoter descendants.

22. Children, grandchildren, and remoter descendants are preferent to all others in the estate of the parents. All the children take equally per capita: but the children or remoter issue of a deceased child take per stripes.

Heir in default of children.

23. The children and remoter descendants failing the whole of the property the deceased derived from the father's said and one-half of the remainder of the estate of the deceased (exclusive of the property derived from the mother's side) the father if surviving, shall inherit.

Mother's right where children fail.

24. The whole of the property the deceased derived from the mother's side and one-half of the remainder of the estate of the deceased (exclusive of the property derived from the father's side) the mother, if surviving, shall inherit.

Right of brother and sister where father has pre-deceased intestate.

25. Father failing, the property of the interest derived from the father's side and one-half of the remainder of the interest's estate (exclusive of that derived from the mother's side) shall devolve upon the intestate's full brothers and sisters as well as upon half-brothers and half-sisters related to the intestate by the side of the father, in equal shares, and their children and other issue by representation, or only on half-brothers and half-sisters related to the intestate by the side of the father and their issue by representation, if there are no full brothers and sisters or their issue.

Right where mother has predeceased intestate.

26. Mother failing, the property of the intestate derived from the mother's side and one-half of the remainder of the intestate's estate (exclusive of that derived from the father's side) shall devolve upon the intestate's full brothers and sisters as well as on half-brothers and half-sisters related to the intestate by the side of the mother, in equal shares, and their children and other issue by representation, or only on half-brothers and half-sisters related to the intestate by the side of the mother and their issue by representation, if there are no full brothers and sisters or their issue.

Right of paternal grandparents, paternal uncles and aunts, and great-grandparents.

27. All the persons above enumerated failing, the property derived by the intestate from the father's side and one-half of the remainder of the intestate's estate (exclusive of the property derived from the mother's side) shall devolve on the paternal grandparent or grandparent of the intestate, if surviving; and failing them, on paternal uncles and aunts and the issues of the paternal uncles and aunts by representation; paternal uncles and aunts and their issues failing, on the great-grandparent or great-grandparents per capita, if surviving, and failing them, on the brothers and sisters of the paternal grandparents and their descendants, if surviving, afterwards on the brothers and sisters of the next nearest in the ascending line of the father and their descendants by representation, if surviving.

Right of maternal grandparents, maternal uncles and aunts, and maternal great-grandparents.

28. The property derived from the mother's side and one-half of the remainder of the intestate's estate (exclusive of that derived from the father's side) shall devolve on the maternal grandparent or grandparents, if surviving; and failing them, on maternal uncles and aunts and the issue of the maternal uncles and aunts by representation; maternal uncles and aunts and their issue failing, on the great-grandparents or grandparents per capita, if surviving; and failing them, on the brothers and sisters of the maternal grandparents and their descendants, if surviving; afterwards on the brothers and sisters of the next nearest in the ascending line of the mother and their descendants by representation who may be surviving.

How estate is divided where those who inherit are equally near in degree to intestate.

29. Except when otherwise expressly provided, if all those who succeeded to the inheritance are equally near in degree to the intestate, they take per capita and not per stirpes.

How property is divided on failure of kindred on the side of either parent.

30. (1) On failure of kindred on the father's side, property derived from that side shall devolve on the mother and her kindred in the order mentioned in the preceding sections.

(2) On failure of kindred on the mother's side. Property derived from that side shall devolve on the father and his kindred in the order prescribed in the foregoing sections.

When whole inheritance goes to the surviving spouse.

31. All the persons above enumerated failing, the entire inheritance goes to the surviving spouse, if any.

When estate escheats to the Crown

32. If any one dies intestate without heirs, his or her estate escheats to the Crown. If, however, any heirs can be found, even beyond the tenth degree, they take the inheritance.

Collation of property by children or grandchildren.

33. Children or grandchildren by representation becoming with their brothers and sisters heirs to the deceased parents, unless they abandon all right to inherit as heirs to the ab intestate, are bound to bring into hotchpot or collation all that they have received from their deceased parents above the others by way of dowry or otherwise on the occasion of their marriage, or to advance or establish them in life, unless it can be proved that the deceased parent either expressly or impliedly released any property so given from collation.

Right of illegitimate children.

34. Illegitimate children shall inherit the property of their intestate mother, but not that of their father.

Devolution of property of illegitimate children.

35. When an illegitimate person leaves no surviving spouse or descendants, his or her property will go to the mother, and then to the heirs of the mother so as to exclude the Crown.

Cases not provided for by this Ordinance.

36. In all question relating to the distribution of the property of an intestate where this Ordinance is silent, the provisions of the Matrimonial Right and Inheritance Ordinance, and such laws as apply to the Tamil inhabitants of the Western Province, shall apply.

PART IV.

LIFE INTEREST.

Interest of surviving spouse in estate devolving on minor child

37. When the estate of a deceased parent devolving in a minor child, the surviving parent may continue to possess the same and enjoy the income thereof until such child is married or attains majority.

Liability of surviving spouse to maintain minor child.

38. A surviving spouse continuing in possession of the estate of the deceased spouse as stated in the last section shall be bound to maintain the children till they attain majority either by effluxion of time or by marriage.

APPENDIX IV

PART V.

INTERPRETATION AND REPEAL

Interpretation.

39. In this Ordinance, unless there is something repugnant in the subject or context-

"immovable property" include land, incorporeal tenements, and things attached to the earth or permanently fastened to anything which is attached to the earth, and any interest in land except such as arises from a mortgage;

"movable property" means property of every description except immovable property;

"matrimonial right" means the respective right and powers of married parties in or about the management, control, disposition, and alienation of property belonging to either party, or to which either party may be entitled during marriage;

"unmarried" means not having a husband or wife living, all words expressive of relationship shall apply to a child in the womb at the time in question who is afterwards born alive.

Repeal

40. So much of the provision of the collection of customary law known as the Tésawalamai, and so much of the provisions of section 8 of the Wills Ordinance, as are inconsistent with the provisions of this Ordinance are hereby repealed.

Reprinted from Vol II. of the Revised Edition of the Legislative Enactment of Ceylon (1938).

APPEDIX V

JAFFNA MATRIMONIAL RIGHTS AND INHERITANCE

ORDINANCE NO. 58 OF 1947.

AN ORDINANCE TO AMEND THE JAFFNA MATRIMONIAL RIGHT AND INHERITANCE ORDINANCE

chapter 48 (vol. II., p. 24).

Assented to by His Majesty the King: See Proclamation dated July 3, 1947, published in Government Gazette No. 9,729 of July 4, 1947.

HENRY MOORE

Be it enacted by the Governor of Ceylon, with the advice and consent of the State Council thereof, as follows:-

Short title.

1. This Ordinance may be cited as the Jaffna Matrimonial Right and Inheritance Amendment Ordinance, No. 58 of 1947.

Amendment of section 2 of Chapter 48.

2. Section 2 of the Jaffna Matrimonial 1 Right and Inheritance Ordinance, (hereinafter referred to as the "principal Ordinance") is hereby amended by the substitution for the word "applies" of the words "applies, and it shall apply in respect of their movable and immovable property wherever situate."

Amendment of section 7 of the principal Ordinance.

3. Section 6 of the principal Ordinance is hereby amended as follows:-

- (1) by the substitution for the word "Any", of the word "All", and
- (2) by the substitution for all their words from "except" to "during her marriage," of the words "which she may during the subsistence of the marriage acquire or become entitled to by way of gift or inheritance or by convention of any property to which she may have been so entitled or which she may so acquire or become entitled to".

Amendment of section 7 of the principal Ordinance.

4. Section 7 of the principal Ordinance is hereby amended as follows:-

- (1) by the substitution for the word "Any", of the word "All", ; and
- (2) by the substitution for all the words from "except" to "during his marriage," of the words "which he may during the subsistence of the marriage acquire or become entitled to by way of gift or inheritance or by concession of any property to which he may have been so entitled or which he may so acquire or become entitled to ,"

Substitution of new section for section 19 of the principal Ordinance.

5. Section 19 of the principle Ordinance is hereby repealed and the following new section is substituted therefore :-

19. No property other than the following shall be deemed to be the thediatheddham of a spouse :-

Meaning of thediatheddham

- (a) Property acquired by that spouse during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of that spouse.
- (b) Profits arising during the subsistence of the marriage from the separate estate of that spouse.

Substitution of new section for section 20 of the principal Ordinance.

6. Section 20 of the principal Ordinance is hereby repealed and the following new section is substituted therefor:-

Devolution of thediatheddham.

20. On the death of either spouse one-half of the thediatheddham which belonged to the deceased spouse, and has not been disposed of by last will or otherwise, shall devolve on the surviving spouse and the other half shall devolve on the heirs of the deceased spouse.

Saving for certain decided cases.

7. The amendments made by this Ordinance shall not be deemed to affect the mutual rights of the parties in the case of Avitchy Chettiar v. Rasamma, D. C., Kurunegala No. 13636. (35 New Law Reports, p 313) or in any other case decided in accordance with the decision of the Supreme Court in the first-mentioned case at any time prior to the date on which this Ordinance comes into operation.

Passed in Council the Fifteenth day of May, One thousand Nine hundred and Forty-seven.

D.C.R. GUNAWARDANA,

Clerk of the Council

APPENDIX V.**THESAWALAMAI PRE-EMPTION.**

**AN ORDINANCE TO AMEND AND CONSOLIDATE THE LAW OF
PRE-EMPTION RELATING TO LANDS AFFECTED BY THE "THESAWALAMAI."**

(Assented to by His Majesty the King : See Proclamation dated
July 3, 1947, published in Government Gazette
No. 9,729 of July.)

HENRY MOORE,

Preamble.

Whereas it is expedient to amend and consolidate the law of Pre-emption governing the sale of immovable property to which the Thesawalamai now applies:

Be it therefore enacted by the Governor of Ceylon, with the advice and consent of the State Council thereof, as follows:-

shorts title and date operation.

1. This Ordinance may be cited as the Thesawalamai Pre-emption Ordinance, No. 59 of 1947, and shall come into operation on a date to be appointed by the Governor by Proclamation in the Gazette.

Restrictions on the right of pre-emption.

2. (1) When any immovable property subject to the Thesawalamai is to be sold, the right of pre-emption over such property, that is to say, the right in preference to all other person whomsoever to buy the property for the price proposed or at the market value, shall be restricted to the following persons or classes of persons:-

- (a) the persons who are co-owners with the intending vender of the property which is to be sold, and
- (b) the persons who in the event of the intestacy of the intending vendor will be his heirs.

(2) For the purpose of this Ordinance, the term "heirs" means all descendants, ascendants and collaterals up to the third degree of succession, and includes -

- (a) children, grandchildren and great-grandchildren;
- (b) parents, grandparents on both the paternal and the maternal sides and great-grandparents on all sides;
- (c) brothers and sisters whether of the full or of the half-blood;
- (d) uncles and aunts, and nephews and nieces, both on the paternal and the maternal sides, and whether of the full or of the half-blood.

Mode of exercising right of pre-emption.

3. The right of pre-emption shall not be exercised save in accordance with the provisions of this Ordinance.

Cases in which the right is permitted.

4. The right of pre-emption shall not be exercised except in a case where the property which is to be sold consists of an undivided share or interest in immovable property, and shall in no case be permitted where such property is held in sole ownership by the intending vendor.

Mode of publication of notice

5. (1) Notice of an intention or proposal to sell to any person not entitled to the right of per-emption under this Ordinance any property to which section 4 applies shall be signed by the intending vendor before a Notary Public. The notice shall be attested in triplicate, but the registration of it shall not be obligatory.

(2) The notice shall set out the actual price offered by the prospective purchaser, but it shall not be necessary to disclose in addition the name of the prospective purchaser.

(3) A certified copy of the notice shall be forwarded forthwith by the intending vendor to that one of the officers enumerated in the second column of the schedule to this Ordinance against whose name the division in which the land is situated is shown in the first column of the schedule.

(4) The officer to whom the certified copy is forwarded shall record the particulars set out therein in a register to be kept by him for that purpose, and shall cause such certified copy to be posted immediately on the notice board of his Court or office as the case may be.

(5) A certificate under the hand of the officer that the notice has been duly posted on his notice-board shall be conclusive evidence of the publication of the notice for the purposes of this Ordinance.

Time-limit for exercising the right by private treaty.

6. (1) Within three weeks of the date of publication of a notice under section 5, any person to whom the right of pre-emption is reserved by this Ordinance, may either tender the amount stated in such notice and buy the property from the intending vendor, or enter in to an agreement to buy it.

(2) Any conveyance of the property executed by the intending vendor within the period of three weeks specified in sub-section (1), in completion of a sale of which he has given notice under section 5 or of a sale to any person other than one to whom the right of pre-emption is reserved by this Ordinance, shall be null and void and of no effect whatsoever in law.

Proceedings for enforcing the right within the time-limit.

7. (1) If a tender made under section 6 is not accepted by the intending vendor, and if the land remains unsold, the person making the tender may, on condition that he has first deposited in Court the amount stated in the notice and tendered by him to the intending vendor, apply to Court within the period specified in section 6, by way of petition duly stamped and verified by affidavit, for an order directing the intending vendor to sell the land to the applicant.

(2) Where the applicant alleges in his petition and proves by his affidavit, that the amount stated in the notice by the intending vendor is fictitious, the deposit of such smaller sum as may be alleged in the petition to be the reasonable price or the market value of the land shall be deemed to be sufficient compliance with the condition in sub-section (1) as to the deposit of money in court.

(3) In the event of any smaller sum being deposited under sub-section (2) the Court shall, without prejudice to such issues relating to the value of the land as may have to be dealt with at the inquiry in to the petition, hold a preliminary inquiry as to the sufficiency of the sum deposited by the applicant, hearing such evidence as it may deem necessary for this purpose.

(4) Any order made by the Court after an inquiry under sub-section (3) shall be final and conclusive; and where such order directs any further sum to be deposited, compliance with the order shall be a condition precedent to the issue of any order nisi, interlocutory order, notice, or process, in the matter of the petition.

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(5) Every petition under this section shall be disposed of according to the rules of summary procedure laid down Chapter XXIV of the Civil Procedure Code; and in the event of the non-appearance or other default of the intending vendor, the Court may, if after due inquiry it is satisfied that the applicant, and the provision of section 333 of that code shall mutatis mutandis apply to any conveyance so executed.

(6) Any conveyance of the property, in completion of the proposed sale, executed by the intending vendor after the service on him of an Order Nisi or Interlocutory Order and before the final order is made in any proceedings taken under this section, shall be null and void and of no effect whatsoever in law.

8. (1) After the completion of a sale of which notice has been given under section 5 or of any sale of which notice has not been given under that section, the right of pre-emption shall not be enforced except by way of regular action, to which the purchaser shall also be made a party.

(2) An action to enforce the right of pre-emption under sub-section (1) may be instituted on any of the following grounds:-

- (i) that the notice required by section 5 was not given or that the notice given was irregular or defective;
- (ii) that the price set out in the notice was fictitious or not fixed in good faith;
- (iii) that at the time of and for three weeks after, the publication of the notice, the person seeking to enforce the right was absent from the district and that within a reasonable time after the lapse of the said period of three weeks and before the completion of the proposed sale, he tendered to the intending vendor the purchase amount stated in the notice, and that such tender was not accepted.

Time-limit to action for enforcing right.

9. No action to enforce a right of pre-emption on the ground that the notice required by section 5 was not given or that the notice given was irregular or defective shall be instituted or maintained

- (1) if the actual purchaser of the land is also a person who at the time of the purchase had the right of pre-emption over the property purchased by him; or
- (2) if more than one year has elapsed from the date of the registration of the purchaser's deed of transfer.

*Registration of his pendens to be compulsory.**Cap. 101.*

10. No precept or order for the service of notice or summons shall be issued in any proceedings or action for enforcing a right of pre-emption, until proof is furnished to the Court of the registration of the proceedings or action as a lis pendens in accordance with the provisions of the Registration of Documents Ordinance.

Deposit of purchase money as proof of plaintiff's bona fides.

11. At any time after the institution of an action to enforce a right of pre-emption, the Court may in its discretion order the plaintiff to deposit the purchase amount set out in the notice given under section 5; and if the plaintiff makes default in depositing the amount within such period, or further period not exceeding three months in the aggregate, as the Court may allow, his action shall be struck off the roll of pending cases.

The minimum price payable by the plaintiff.

12. No person seeking to enforce a right of pre-emption by way of petition or by regular action, shall be permitted to take over the property for a less amount than that stated in the notice given under section 5 or recited as the consideration in the deed of transfer executed by the vendor: provided, however, that if the amount so stated or recited is proved to the satisfaction of the Court to be fictitious, the Court may ascertain the actual price paid and the market value, and allow the property to be value, whichever of these is the larger.

Equality of rights of all persons entitled to per-empt; and auction in case of competition among them.

13. All co-owners and heirs within the meaning of section 3 shall be deemed to have an equal right to pre-empt any share or interest in property sold without due publication of the notice required by section 5, and there shall be no preference or precedence among them; Provided, however, that in the event of any competition among such co-owners and heirs, the Court may accept the highest offer made by any of them, if such offer is also larger than the actual price paid or the market value, whichever of these is the larger.

Repeal.

14. So much of the "Thesawalamai" and of the Ordinance, No.4 of 1895, entitled "An ordinance relating to the publication of intended sales or other alienations of Immovable property affected by the Thesawalamai of the Northern Province of Ceylon" as is inconsistent with the provisions of this Ordinance, is hereby repealed.

SCHEDULE.

(section 5 (3))

Column 1.	Column 2.
1. Administrative limits of the Urban Council Jaffna	Chairman, urban Council
2. Administrative limits of the Sani.. tray Board town of Point Pedro	Chief Clerk, Magistrate's Court
3. Administrative limits of the Sani tray Board town of Kayts ..	Chief Clerk, Magistrate's Court
4. Do. Valvettiturai ..	Postmaster, Valvettiturai
5. Do. Mullaittivu ..	Chief Clerk, Magistrate's Court
6. Do. Mannar ..	do.
7. Do. Vavuniya ..	do.
8. Any village area in the Northern .. mittee	Chairman of the Village Comprovince

Passed in council the Fifteenth day of May, One thousand Nine hundred and Forty-seven.

D. C. R. GUNAWARDANA
Clerk of the Council.

THE SCOPE OF ORDINANCE No. 58 OF 1947

The primary object of the Jaffna Matrimonial Rights and Inheritance Amendment Ordinance No. 58 of 1947 was to restore the old concept of *Thediatëttam*. Section 5 of this Ordinance repeals section 19 of the principal Ordinance and gives a definition of *Thediatëttam* so as to include only those properties acquired by the spouse during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of that spouse and profits arising during the subsistence of the marriage from the separate estate of the spouses.

Section 6 of this Ordinance has given rise to several controversies. It abolished Section 20 of the Jaffna Matrimonial Right and Inheritance Ordinance which declared the *Thediatëttam* common property of both spouses although it was acquired by either spouse and retained in his or her own name. Before the Jaffna Matrimonial Rights and Inheritance Ordinance came into force when *Thediatëttam* property was acquired in the name of one of the spouses the other spouse acquired an interest in the other half. The exact nature of the interest is difficult to understand in view of the conflicting judgments of our Courts. Bertran, C. J. thought that when the husband bought such property in his name he held in trust a held share of the property in favour of his wife (see *Seelachy vs. Visuvanathan*, 1922, 23 N. L. R. 97 (116)). But another view was that though the property is bought in the name of one spouse legal title is held vested in the other spouse. The husband as manager of the community had certain powers of alienation. *Ponnachchy v. Vallipuram* (1923), 25 N. L. R. 151.

This conflict was resolved by Section 20 (1) of 1911 which declared *Thediatëttam* the common property of both spouses although acquired in the name of only one of them.

The effect of the repeal of Section 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48) is to place the proprietary rights of spouses over *Thediatëttam* in the same position as they were before 1911 when this ordinance came into operation.

Under the Law of Thesawalamai the surviving spouse was never regarded as an heir to the deceased spouse. The effect of Section 6 of Ordinance No. 58 of 1947 of to make one spouse an heir to one-half of the *Thediatëttam* belonging to the deceased spouse. In this connection a distinction must be drawn between the words "*Thediatëttam* of a spouse" in Section 5 of Ordinance No. 58 of 1947 and the phrase "*Thediatëttam* of a spouse" in Section 6. It is submitted the phrase "*Thediatëttam* of a spouse" means *Thediatëttam* acquired by that spouse; out of this a held share belonged to the other spouse even before the Jaffna Matrimonial Rights and Inheritance Ordinance came into operation. (See the provisions of Part I, Sections I and II of the Thesawalamai Code, Cap. 51)

Under Section 6 of Ordinance No. 58 of 1947 on the death of either spouse, one-half of the *Thediatëttam* which belonged to the deceased spouse, and has not been disposed of by last will or otherwise devolves on the surviving spouse and the other half devolves on the heirs of the deceased spouse. It may be thought that the phrase "has not been disposed of by last will or otherwise" connoted that this Ordinance gives the spouse in whose name the *Thediatëttam* is bought the right to dispose of it by last will or otherwise. It is submitted that this is an erroneous view. This phrase only indicates the quantum of *Thediatëttam* left at death which has not been disposed of by the spouses by the exercise of the power such spouse had under the law of Thesawalamai. It confers on additional powers of alienation.

Section 7 of this Ordinance which seated that amendments made by this Ordinance shall not be deemed to affect the mutual rights of the parties in the case of Avitchy Chetty vs. Rasamma, 35 N. L. R. 313) or in any other cases decided in accordance with the decision of the Supreme Court in the first mentioned case at any time prior to the date on which this Ordinance comes into operation" has given rise to the view that this Ordinance is retrospective. (See 50 N. L. R. 293)

The matter has ow been referred to a Fuller Court. (See S. C. 554 of 1949 D. C. Pt. Padru 2873). Clauses of this nature are often found in legislative measures and it does not necessarily follow fro the existence of such clauses that by necessary implication the intention of the legislature us to make it retrospective.

Under the English law statutes changing the substantive law are not regarded as retrospective unless it is so expressly stated or by necessary implication it is retrospective (see Maxwell on Interpretation 9 Edit, p. 221. Under the law of Ceylon if an Ordinance takes away vested rights in must expressly state that it is retrospective. (See Section 6 (3) of the Interpretation Ordinance., Cap. 2)

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